CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

DECEMBER TERM, 1832.

HARRIET D. EPPES v. JOEL MCLEMORE.

Where A agreed to purchase a slave for B, but took the title to himself, and afterwards, the slave being in the possession of B, the purchase money was tendered by him to A, who declined taking it, but did not disclose his title: *Held*, that the jury were properly instructed that they might from these facts, infer a subsequent sale.

DETINUE for a slave, and on the trial at Halifax, on the Fall Circuit of 1831, before SWAIN, Judge, the case was, that the slave in dispute had been the property of the plaintiff's husband, and was sold under an execution against his executor and bought by one *Johnston*, who paid the purchase money, and to whom the sheriff returned he had sold. The only question was, whether the following circumstances vested the title in the plaintiff, so as to prevent the defendant from taking any thing under a subsequent sale to him by *Johnston*. The negro had been in possession of the plaintiff before the sale by the sheriff, and directly after it returned to her house. A witness introduced by the plaintiff, deposed, that before the sale *Johnston* agreed to purchase the negro for the plaintiff; that after that took place, the plaintiff offered to pay *Johnston* the price at which he had bought the slave, which he then declined receiving, requesting her to keep it; that at the time this offer was made, the plaintiff had the money in her possession, but

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it was not produced in consequence of *Johnston's* wish that the plaintiff should retain it. Upon this point, the evidence was contradictory, and thereupon the counsel for the defendant moved the presiding judge to instruct the jury, that if *Johnston* purchased the slave at the request, and for the use of the plaintiff, as the slave was bid off and returned by the sheriff as purchased by him, the legal title vested in him, subject only to a trust for the plaintiff, and that the matters deposed to by the plaintiff's witness were not sufficient to vest that legal title in the plaintiff; and further, that the legal title being in *Johnston* could not be passed to the plaintiff without a written transfer, or a sale accompanied with a delivery. But his Honor refused to give these instructions, and charged the jury, that if they believed that *Johnston* purchased the slave at the request of, and as the agent of the plaintiff; and delivered the negro to her as her property; that the price bid by *Johnston* was tendered to him at the time of the delivery, and was not paid because of his request; or if he was satisfied with the plaintiff's promise to pay him the amount; they were at liberty to find that there was a valid sale by *Johnston* to the plaintiff.

A verdict was returned for the plaintiff, and the defendant appealed.

Badger, for the defendant.

Devereux, for the plaintiff, relied upon *Choate* v. *Wright*, (*ante* 2 *vol. page* 289.)

Ruffin, Judge.—I suppose the first instruction prayed on behalf of the defendant, to be correct as far as respects the vesting of the legal title in *Johnston*, by the purchase in his own name, and his becoming responsible to the sheriff for the price, notwithstanding the previous agency undertaken by him. If he chose to violate his engagement and take the title to himself, he might do so. But if he did, that did not prevent a subsequent sale to the plaintiff; and that brings the question to the last part of that instruction, and to the next as asked for:

which is, that the evidence did not establish a sale from *Johnston*, or that the legal title passed from him in any way.

The court is of opinion that the jury might find, that it did. The possession of the slave was transferred to the plaintiff, who offered to pay an ascertained price, which *Johnston* agreed to accept. It is true, the witness says, this was in reference to the previous agreement of *Johnston* to buy the negro for the plaintiff; and therefore, there was then no proposition about the price. But although the plaintiff claimed upon the score of the agency, because she did not know that the purchase had been made in *Johnston's* own name; yet when *Johnston* acquiesced in it, and made the plaintiff believe that she had thus the title in one way, when in fact she was getting it in another, the plaintiff's mistake as to the mode in which it passed, shall not prevent her from acquiring it in any mode, if the acts then done, in their legal operation, passed the title of themselves. Did the plaintiff and *Johnston* then consider that the right to the slave was in the former, by virtue of what was before and then done? Was every thing done, that was expected or intended to be done, to vest the title in the plaintiff; and was this followed or accompanied by actual delivery? If so, it is a sale. It is an agreement that the property is, or shall be another's; and that agreement consummated by delivery. Suppose Mrs. *Eppes* had then paid the price: would any body doubt the character of the transaction? Her agreement to pay is the same thing, if taken by the seller in place of the money; and such the witness said was the fact—upon the conflicting testimony, it was for the jury to determine. Taking that offered by the plaintiff to be true, there was a contract of sale, which accompanied by possession, is an executed contract and valid. (*Choate* v. *Wright*, *ante* 2 *vol.* 289.)

A contract for the sale of a slave accompanied with possession by the vendee is valid.

The case of *Choate* v *Wright*, (*ante* 2 *vol.* 289) approved.

PER CURIAM.—JUDGMENT AFFIRMED.

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JEFFERSON T. WILLIAMS *v.* COLIN W. BARNES, *Adm'r.*

Where a child upon his arrival at full age continues to reside with and serve the parent, in an action to recover the value of those services, the relation subsisting between the parties is a circumstance from which the jury may infer that they were gratuitous.

ASSUMPSIT for work and labor done by the plaintiff as the overseer of the defendant's intestate, tried on the Spring Circuit of 1832, before DANIEL Judge, at Northampton. Plea—*Non assumpsit.* The case was, that the plaintiff lived with the defendant's intestate, his mother, until he came of age in the year 1826; that during the two following years he acted as her overseer; that before the plaintiff came of age the intestate had usually hired another person; that the plaintiff had been carefully and tenderly reared by his mother, who had, during his infancy, given him two negroes, besides money and other property; that during the period when he acted as her overseer, he resided in her house, and had taken up articles for his own use, which had been charged to his mother's account and paid for by her. It was also in proof, that the defendant's intestate had a large family, and died worth about $2000. The counsel for the defendant insisted, that where a child had been brought up by a mother, and tenderly and liberally supplied by her during his minority, from his continuing to reside with her after his full age, and rendering her such services as the plaintiff in this case had done, the law did not imply a promise of compensation, but these services were presumed to be rendered in discharge of a duty of filial piety, and therefore that it was incumbent on the plaintiff to rebut this presumption, and if he did not do it, that the law did not imply a promise to pay the value of the services. But the presiding judge informed the jury, that where a person renders valuable services to another, the law presumes a promise to pay for them, unless the contrary appears, and that the case of parent and child was in this respect, like that of any other person; that upon this presumption, the plaintiff was entitled to their ver-

dict, unless it was rebutted by the other circumstances in evidence, from which they were at liberty to infer that the services were gratuitous.

A verdict was returned for the plaintiff, and the defendant appealed.

Badger, for the defendant.

The plaintiff was not represented.

RUFFIN, Judge.—The plaintiff being unable to shew a special agreement, is obliged to rely upon an implied promise, founded on his services. The judge properly left it to the jury to find whether there was or was not such a promise, as they should judge from the circumstances, that it was in the contemplation of the parties that the services were to be gratuitous or compensated. Had the instruction stopped there, perhaps it would be unexceptionable; though I have a strong impression, which may possibly arise from the involuntary emotion of detestation of the odious irreverence and ingratitude of a son, who says to a widowed mother the day he is twenty-one, "pay me now for all I do," that the plaintiff ought to have offered evidence to raise affirmatively a presumption, that his time and labor were understood clearly, by both parties to be given for a price. In the present case however, there is no necessity for saying that such is the law. The court after leaving the circumstances to the jury, told them, that the relation of parent and child, with all the incidents thereto, in this case was not one of the circumstances, from which they could infer any thing. That I think and feel, is clearly wrong. Compensation is expected from strangers, because they have no right, legal or moral, to another's time. *Prima facie* therefore, a promise to pay is presumed. It may be so likewise, for aught I know, in the case of parent and child generally. But in such a case as the present, the relation is a fact which among others, the jury have a right to consider, in connexion with the circumstances in life of the parties, and their whole conduct before and after the arrival of the child at full age, to rebut the presumption of a promise, which would arise in the case of

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a stranger. It is a conclusion of fact with the jury; and they have a right to avail themselves of all the circumstances, including this relation, with the weight they think it entitled to, from their own feelings as sons and fathers, and from their knowledge of our state of society. It is not an irrelevant circumstance but is a strong one. With me, were I on the jury, it would be hard to get over—it is true, the son is not bound in law to serve his parent after twenty-one. But is there no bond but that of the law? No gratitude for bounties already bestowed, no filial piety, no affectionate regard—nothing to keep the son under the maternal roof, but the prospect of gain? And if gain be the object, does it follow that it was to be in the shape of annual wages and none other? It might be, that the son himself did not choose to labor abroad; that he had no other means of livelihood; was not fit for other business; had no estate, and would not submit to be overseer from home—in fine, that it was a continuation of parental favor to suffer him to remain in, what he had not elsewhere, a comfortable home—by the parent too he might expect his attention, and even his labors to be more fully requited, than by any other person, though from the latter he should get wages, and from the former none. He might look to further advancement; or to a liberal legacy; the more liberal because his tenderness and assiduities made him a favorite. It cannot be possible, that the head of an harmonious household must drive each member off, as he shall arrive at age, or be bound to pay him wages, or for occasional services, unless he shews that it was agreed that he should not pay. Such a position offends the moral sense. If true, it would dissolve that connexion, the duties and the enjoyment of which are the cement which unites families. It is the interest of society at large to preserve that union, and make it as close and cordial as our selfish natures will allow—as yet it has not in practice been deemed, more than it has been established in morals, that years of legal maturity severed altogether the tie between parent and child; legal control expires, it is true, but the relation and all the feelings incident to it remain, to give

a character to, and raise presumptions concerning their acts towards each other, essentially differing from presumptions from the like dealings between strangers. I do not trust myself to say yet, that the want of evidence of an express contract is evidence that there was no contract; though I believe I would, if necessary, in such a case as this, when the son merely continues his residence with his mother, receives his ordinary supplies from her, as proved by articles got for him at stores being put to her account, and when he does not prove that he discharged *all* the severe duties usually exacted from overseers, and may therefore have acted rather as master than served as man. But this much I must say, that the jury had at least a right to pass upon the weight of the actual presumptions arising from the relation, both in estimating the wages which the plaintiff ought to be allowed, if any, and in determining whether he was to have any, except what the mother chose, in her natural kindness to bestow. In other words, whether they were to live together after, as they had done before the son became of age. I think such claims, without probable evidence of a contract, ought to be frowned on by courts and juries. To sustain them tends to change the character of our people, cool domestic regard, and in the place of confidence, sow jealousies in families. There must be a new trial.

HENDERSON, Chief-Justice, concurred.

DANIEL, Judge, *dissentiente*.—There is a natural and legal obligation on the parent to maintain his child during infancy. The law has fixed the time during which the child shall be considered an infant, to the period of twenty-one years. The parent, during this period, has a right to the services of the child to enable him to fulfil his obligations. But after the period of twenty-one years, the parent is released from his obligation, and the child is bound to maintain himself; and the law likewise releases the child from the obligation of giving his labor and services to the parent; because it then becomes necessary for him to use his industry for his own maintenance. Therefore when he labors for the parent after the time

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he arrives at the age of twenty-one years, the law raises a promise by the parent, to pay as much as the labor of the child is reasonably worth. The circumstance of the relationship of parent and child, may go to the jury as evidence, with other facts and circumstances, to aid the defence of the parent, upon the question whether the labour of the child was gratuitous or not; but it does not operate as an exception to the rule of law. In the case before the court, the defendant had the benefit of such a circumstance, in his defence. The jury have found a verdict for the plaintiff, by which the allegation of the defendant, that the labor of the plaintiff was intended to be given gratuitously, is negatived. I therefore think there ought not be a new trial.

Per Curiam.—Judgment reversed.

Samuel C. Wilson v. William Murphey.

Assumpsit will not lie upon a promise to pay a debt when the same debt may be recovered in an action on a specialty—but it is otherwise, when from any cause, no action, on the bond, can be sustained.

Where land was demised by deed, and the lessor covenanted to pay for certain work done on the premises by the lessee, and after the expiration of the term, the lessor promised to pay the lessee an ascertained balance for the work done: *held*, that assumpsit for the balance was improper.

Assumpsit commenced by a warrant, in which the plaintiff declared for work done by him upon a plantation of the defendant's. On the trial, at Burke, on the Fall Circuit of 1831, before his Honor Judge Daniel, the case was, that the plantation upon which the work had been done, was, in the year 1819, demised by the defendant to the plaintiff by deed for three years; in the lease which was executed by both parties, there was a stipulation on the part of the defendant, "that for all the necessary rails made and put upon the fences, he (the plaintiff) is to be allowed 50 cents per hundred out of the rent." After the expiration of the term, the parties

came to a settlement, when the balance claimed by the plaintiff was found to be due him, which the defendant then promised to pay. At the same time, the lease having been deposited in the hands of a third person, an order for its delivery to the plaintiff was executed by the defendant.

For the defendant it was objected, that the plaintiff had mistaken the form of action; that covenant upon the lease should have been brought instead of the present action. The presiding judge overruling the objection, a verdict was returned for the plaintiff, and the defendant appealed.

No counsel appeared for either party.

Ruffin, Judge.—I should very gladly decide this small cause for the plaintiff (who is a pauper,) if I could do so without removing the land marks of the law. We must take it that the sum due him upon the settlement, was for work mentioned in the lease to be done on the plantation, namely, getting rails at a particular price. If so, he still had a remedy on the covenant in the lease, which was executed by both parties. Can he have the inferior one of *assumpsit* for the same thing? If one owe money on a bond and engage by parol to pay it on such a day, he cannot be sued in *assumpsit*. This is not a mere technical rule. All the securities which deeds are intended to create, as to the terms of the contract, in favor of the covenantor, depend on it. If indeed there be no remedy on the deed; if the contract has been rescinded, or abandoned before breach; if after breach it has been delivered up, or satisfaction entered upon a settlement; then it is different, because there is then, but one remedy and that on the promise. If one covenant to build a house for another by a particular day and fail, but builds it afterwards and it is accepted, the deed does not bar an action on the *quantum meruit*, though it may restrict the prices to those specified in it. So if any other executory agreement be rescinded before breach, and in consideration of that, the parties account, *assumpsit* lies for the balance struck. Why? Because there is no re-

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medy on the deed. That was precisely the case of *Foster* v. *Allanson*, (2 *T. R.* 479), and is the footing on which Judge Buller rests his decision, and this was after the case of *Moravia* v. *Levy*, before him at *Nisi Prius*. A partnership was then formed by deed for seven years, and there was a covenant to account annually, and to account and pay at the end of the term. Before the seven years were out they agreed to dissolve, and then to account and pay. They did account, and the action was brought for the sum acknowledged to be due. On the deed, no action could by its terms be then brought; and Buller said, the question was, whether the dissolving a previous partnership and settling the account, was or was not, in point of law, a sufficient consideration for an express *assumpsit*; which he clearly held in the affirmative. But no instance can be stated, in which, after the time limited in a deed, for the performance of a duty, thereby created, an action can be maintained on a promise to fulfil the covenant, the deed remaining all the while in existence and full force. The reason is, because precisely the same evidence, as to the extent of the demand, and indeed every other matter, but the making of the agreements and the terms of them, will support both actions. And whether the law ought, for the certainty of the contract, to take the specialty or the verbal agreement, it is easy for any to judge. Here, for example, the lease fixes the price of the rails. It might be different, if that were left uncertain; for fixing the price is in itself, a new agreement, distinct from any provision in the deed; but in the present case, the only further requisite to a full recovery on the deed, is, evidence of the quantity; and that is as susceptible of proof in an action on the covenant, by the acknowledgement of the defendant, as it is in *assumpsit*. There is then no new consideration for the promise, and the deed remained in force, for it was to be delivered to the plaintiff by the holder, not as far as appears, to be cancelled, but as properly belonging to the only person who then had an interest in it, and could take advantage under it. In such a case, I think no action lies on the promise

merged in the existing deed, more than on a promise merged in a deed or judgment subsequently taken for the same debt. The case of *Codman* v. *Jenkins*, (14 *Mass. Rep.* 93.) is an authority in support of the general reasoning I have adopted, and also of the import of *Foster* v. *Allanson*, which is cited and commented on by the court. That was the case of a lease for life, and an assignment by the lessor of the reversion; the assignee and the lessee come to an account of the rent in arrear in his time, and the tenant made an express promise to pay it: held, that *assumpsit* would not lie, but that it ought to be debt or covenant. This seems to me to be in point; and I think there must be a new trial.

PER CURIAM.—JUDGMENT REVERSED.

GEORGE CROWELL v. STEPHEN KIRK, *et al.*

A party is not bound to offer an incompetent witness in order that his adversary may waive the objection and cross-examine him.

This was an issue as to the validity of the will of one *Buckner Kimball*, tried on the last Spring Circuit, at Montgomery, before NORWOOD, Judge. The plaintiff and one *George Kirk*, were the attesting witnesses. In the will, a legacy was given to *Harris Kimball*, who was dead, whose daughter the plaintiff had married, after the death of the testator; this fact, together with the non-residence of *Kirk*, the other attesting witness, having been proved to account for the plaintiff's not producing them, the case was, on his side, left to the jury, upon proof of the hand writing of the attesting witnesses, and the examination of the person who drafted the will. There being some obscurity in the rest of the statement certified with the record, a literal copy of it is given:—

"The defendants called and examined *George Crowell*, "(the plaintiff,) and he (the witness,) also proved the "legal execution of the will, and the subscription of the "witnesses in the presence of the testator. The defen-

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"dants examined *William Harris*, who gave evidence, "that *Buckner Kimball* died about two years ago, in old "age, that he was very intemperate, and always drunk "when he could get liquor, and when drunk, talked "much, and was wilder than drunken men usually are; "that he was sometimes sober and sometimes drunk, "and when sober was in his proper mind, and talked "but little; that he saw him sometimes at home, in the "latter part of his life, sober, and in his senses. The "defendant's counsel then asked the witness, 'Is it "your opinion that *Buckner Kimball* was at the time, &c. "capable of making a will?' This question was objected "to and overruled by the court, with an observation, "that it could not then be asked, as there was no evi- "dence before the jury that the testator was insane."

An affirmative verdict was returned and the defendant appealed.

Gaston, for the defendants.

The plaintiff was not represented.

Daniel, Judge.—By the act of 1789, (*Rev. c.* 308,) contested wills shall be proved by all the living witnesses if to be found, and by such other persons as may be produced to support it. In the present case, one of the subscribing witnesses had removed from the state, and the other had become interested, by marrying a woman who claimed an interest in a legacy given by the will, if it should be established. When one of the attesting witnesses is abroad, it seems to be sufficient, as in other instances of instrumentary proof, to give evidence of his hand writing. (*Starkie Ev.* 1693. *Jackson* v. *Van Dusen*, 5 *John. R.* 144.) It is, upon this testimony, left to the jury to presume, that the witness subscribed the will in the presence of the testator. (*Croft* v. *Pawlet*, *Str.* 1109.)

The defendant's counsel asked his own witness, *Harris*, if, in his opinion, the testator was capable of making a will; an objection being made, the witness was not permitted to answer the question. I do not think that the judge erred in this. The opinions of witnesses, in England, are confined to persons of science, art or skill, in

Per Daniel, J. An attesting witness may be asked his opinion of the testator's sanity, but the

some particular branch of business, and they have to give the reasons upon which their opinions are founded. All other witnesses are to state the facts, and the jury make up their opinion on the facts thus deposed to. In this country, the courts have said that the law placed the subscribing witness about the testator, to ascertain and judge of his capacity. (*Heyward* v. *Hazard*, 1 *Bay*. 335. *Chase* v. *Lincoln*, 3 *Mass. R.* 237. *Poole* v. *Richardson*, *Ib.* 330.) But no case has gone the length of permitting the evidence of opinion, offered in this case, to go to the jury. The judgment should be affirmed.

same question to another witness, is improper.

RUFFIN, Judge.—I do not perceive the force of the objection to the opinion of the court, upon the first question of evidence. It is said, that the plaintiff ought to have offered *George Crowell*, and left it to the other side to object to his competency; because it puts the defendant to a disadvantage, when obliged to bring him forward as his witness, instead of cross-examining him. I do not know any rule which obliges a party to tender a witness, known and proved to be incompetent; and the result proves, that then there was no improper design, for the witness' testimony was such as the plaintiff would have wished to offer, had it been in his power. He was interested at the time of the trial, and became so by the act of God, namely, the death of his father in-law, after his attestation and marriage. Nor is it correct to say, that a person who calls a witness to a will is bound to take his testimony as true. He is not his witness, but that of the law. The party is obliged to call the subscribing witness; another to the same fact will not answer. Therefore, he may contradict and discredit him, and so may any person, who uses him as the subscribing witness. This was done in the case of *Lowe* v. *Jolliffe*. (1 *Bl. Rep.* 366; *Bul. N. P.* 964.)

Per RUFFIN, J. An attesting witness is the witness, of the law, and may be discredited by any one who examines him.

The court is unable distinctly to comprehend the object, or indeed, the meaning of the question, which the defendant was not permitted to ask the witness *Harris*. It is stated with an *et cetera*, which perhaps does not entirely convey the idea of the party to us; and it is not

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the better understood, when taken in connexion with the reasons which, as stated, induced the judge to reject the evidence. There is, probably, some mistake in transcribing the case. As far as we perceive any meaning, we suppose the attempt was to get the opinion of the witness, whether the supposed testator had capacity *to make a will*. It could not be, whether he thought him in possession of ordinary faculties, when he executed the instrument; because the witness did not profess to have been present; and because he had just said, that when sober, he had his proper mind and senses. If this was the purpose of the enquiry, it was properly refused; for the witness is not to decide what constitutes mental capacity, or a disposing mind and memory; that being a matter of legal definition. He might state the degree of intelligence or imbecility in the best way he could, so as to impart to the court and jury the knowledge of his meaning, that they might ascertain what was the state of the testator's mind and memory; but whether that was adequate to the disposition of his property by will, did not rest in the opinion of the witness.

PER CURIAM.—JUDGMENT AFFIRMED.

DANIEL B. GRIFFIN v. JACOB ING.

A general jurisdiction is not ousted, except by plain words or a necessary implication; and notwithstanding the act of 1828, *c.* 9, giving a justice of the peace jurisdiction in cases where the debt and interest exceed one hundred dollars, and the act of 1826, *c.* 12, authorizing the courts to dismiss a suit for less, yet as there are no words in those acts ousting the jurisdiction of the Superior Courts, in cases of debt for one hundred dollars and interest, it remains.

DEBT upon a single bond, for $ 100, payable the 1st of January, 1828, executed by the defendant to the plaintiff. The writ was sued out the 21st of May, 1829, returnable to the ensuing term of Wake Superior Court. At the return term, the defendant pleaded in chief. The cause came on to be tried on the last Spring Circuit,

before his Honor Judge DANIEL, when the counsel for the defendant moved that it be dismissed for want of jurisdiction. His Honor sustained the motion, and the plaintiff appealed.

The *Attorney General*, for the plaintiff.

Badger and *Devereux*, for the defendant, cited *Crisp* v. *Bunbury*, (21 *Eng. C. L. Rep.* 333.)

RUFFIN, Judge.—The act of 1820, *ch.* 1045, extends the jurisdiction of a justice of the peace to all sums not exceeding one hundred dollars; and by the third section enacts, that all suits in the Superior or County Courts, on any bond &c. for a less sum than $100 shall be abated on the plea of the defendant. Before that act, the courts had jurisdiction of all the sums not under £30. There is nothing contradictory in the possession, by two courts, of jurisdiction of the same matter. In most respects, the jurisdiction of the Superior and County Courts is concurrent in civil cases. Nor can a general jurisdiction be ousted but in plain words or as plain implication. Such an implication I should deem to arise, if a special court were constituted to try conclusively and finally, a particular set of controversies. Perhaps this would be so, although such controversies were not then existing; though, if they were, the argument would be the stronger, that the cognizance was exclusive. But the inference is the other way generally; because it is for the benefit of the citizen to give him the choice of his forum. We cannot go beyond the words of the legislature in destroying the jurisdiction. It may possibly have been the purpose of the acts enlarging that of a justice of the peace, absolutely to exclude all others; but we must say, that it is only exclusive as far as it is expressed. Under the act of 1820, both the justices and the courts have jurisdiction of the sum of $100: the former, because it is raised to all sums *not exceeding* that, and the latter, because the act takes it away in all cases for *a less* sum. At the point of $100 they meet, and their jurisdiction is concurrent. The act of 1826,

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ch. 12, repeals the section giving a plea, and substitutes an authority to the court to dismiss the suit, if brought for a sum *under* $ 100. This left the concurrent jurisdiction as it was, in respect of the sum; but changed the mode of taking advantage of the want of it by a court. Then comes the act of 1828, ch. 9, which confers on a justice of the peace, jurisdiction, in cases where the principal money may not exceed $ 100; altho' that and the interest together may. In this act, no plea or motion to dismiss is given, if a suit be brought in such case. The bond on which this suit is brought is of the character described in the act of 1828—it is one of which jurisdiction is thereby given to a justice of the peace; but there is nothing to deprive the courts of jurisdiction, even by remote implication—we are authorised to dismiss only when the sum is *under* one hundred dollars; and the plea being taken away, and the motion to dismiss being the only mode given by the statutes, as to suits for sums above £30, the jurisdiction of the courts, upon the purview of all the statutes, is concurrent with that of a justice of the peace, as to suits for the sum of $ 100, or exceeding that sum, in cases where that sum is the principal money due. If the contrary was the intention of the legislature, it is yet to be expressed; and without their sanction, the complaint of a citizen cannot be dismissed unheard.

The judgment must therefore be reversed and the cause removed to the Superior Court, to be tried on the issues joined.

PER CURIAM.—JUDGMENT REVERSED.

BARNABAS JONES *v.* MINTON JONES.

A judgment of a single magistrate, for a sum above his jurisdiction is void, and no action can be maintained on it.

This suit was originally commenced before a justice of the peace, by a warrant sued out May 23d, 1831. The

plaintiff declared upon a former judgment which was dated March 10th, 1827, and was for "$75, with interest from the 25th of December, 1818." At the trial on the last Spring Circuit, before DANIEL, Judge, at Wake, a verdict was taken for the plaintiff, subject to the opinion of the court upon the question whether the judgment having been rendered before the passage of the act of 1828, c. 9, giving justices of the peace jurisdiction where the principal and interest exceeds $100, was not void.

His Honor being of opinion with the defendant, set aside the verdict and entered a nonsuit, from which the plaintiff appealed.

Devereux, for the plaintiff, cited *Littlejohn* v. *Underhill*, (2 *Carolina Law Repository*, 574.)

W. H. Haywood, contra.

DANIEL, Judge, after stating the case as above, proceeded: The first judgment being for a larger sum than a justice of the peace had jurisdiction of, it is void, and no action can be maintained upon it.

PER CURIAM.—JUDGMENT AFFIRMED.

THE GOVERNOR *upon the relation of* JOSHUA WITHERSPOON v. SAMUEL W. DAVIDSON *et al.*

A constable who is charged with the collection of a debt, ought to see that good surety is given for the stay of the execution, and if he, being insolvent, becomes the surety, it is a breach of his official bond.

The case of *Keck* v. *Coble*, (*ante* 2 *vol. page* 489,) approved.

DEBT. upon the bond given by one *Cook*, upon his being appointed a constable. The breach assigned was, that *Cook* had failed to collect and account, to the relator, for a note put by the latter in his hands, made by one *Jarvis*. On the trial, before DONNELL, Judge, at Wilkes, on the last Spring Circuit, it appeared that *Cook's* office expired in January 1830; that he received the note in October 1829, and in a few days obtained a judgment thereon;

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that the defendant *Jarvis*, prayed a stay of execution, which was granted, and that *Cook*, the constable, became his surety; that *Cook* was then insolvent; and that the stay did not expire until after *Cook's* term of office. It was contended for the plaintiff, that *Cook*, in becoming the surety for the stay, had failed to use due diligence, and had, by his own act, impeded the collection of the debt, and thereby committed a breach of his official bond. But the presiding judge informed the jury, that as the stay was allowed the debtor by law, the constable's becoming his surety for it, was not such a departure from duty, as to subject the sureties to his official bond; and farther, that as the stay of execution did not expire until after the constable's term of office, upon the authority of the case of *Keck* v. *Coble*, (*ante* 2 *vol. page* 489,) it was unnecessary to enquire, what steps had been taken by *Cook* in relation to the debt, after that time. The plaintiff, in submission to this opinion, suffered a nonsuit and appealed.

No counsel appeared for either party.

Daniel, Judge, after stating the case as above, proceeded: We think it was the duty of *Cook*, as the agent of the relator, to have objected to the justice accepting any surety offered by *Jarvis*, the defendant in the warrant, who was not good. In relation to this duty, he being then insolvent, became the surety himself; thereby, depriving the relator of the benefit of his execution, or of a good and sufficient surety for the stay of it. We think such conduct in *Cook*, under the relation he then sustained to the relator, was evidence of negligence, in endeavoring to collect the money on the judgment, and that the relator has a right to recover, if the facts shall so appear to the jury. The case of *Keck* v. *Coble* does not militate against this decision. That case turned on different principles and was correctly decided. The judgment of nonsuit should be set aside and a new trial granted.

Per Curiam.—Judgment reversed.

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ROBERT CANNON *v.* A. W. BEEMER, *et al.*

The exercise of a discretionary power, in the superior court, cannot be examined upon an appeal.

This was an action of DEBT, tried on the last Spring Circuit at Wake, where the plaintiff obtained a verdict, which was set aside, upon the payment of the costs of the term. Directly after the rule was made absolute, one of the defendants applied to the clerk, and paid him his costs; during the term, several witnesses, who were examined on the trial, proved and filed their tickets.—The defendant who paid the cost, made no enquiry of the clerk, as to the costs of the witnesses; neither did the clerk give him any information relative to them.—No notice of the tickets being filed was given to any of the defendants; and in no way, except by inference, did it appear that they knew the tickets would be filed.—Upon these facts, the plaintiff on the last circuit, moved for judgment upon the verdict, insisting that the condition upon which the new trial had been granted, had not been performed. The defendant resisted the motion, and paid the costs of the witnesses into the office.

His Honor, Judge NORWOOD, directed judgment to be entered upon the verdict, and the defendants appealed.

Manly for the defendant.

Badger and *W. H. Haywood* for the plaintiff.

DANIEL, Judge.—We do not agree with the plaintiff's counsel that the terms of the rule import that the costs should be paid at that time. Upon the second point, we think that the questions, whether the terms of the order had been complied with, or whether a new trial should be granted, were addressed solely to the discretion of the judge below. We are of opinion that he was too rigid with the defendant, yet as he exercised a discretionary power, we cannot disturb his judgment.

RUFFIN, Judge.—The granting a new trial, and the terms of it, were altogether in the discretion of the Su-

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perior Court, where the rule was made: and so also was the enlarging the rule, or the refusal to enlarge it, at the subsequent term. We should indeed in the case stated in the record, if that be all, have been disposed to enlarge the rule in this case; but I am not as capable of forming as correct an opinion, as the judge who presided and knew the value of the controversy, and all other circumstances; and as it is a matter of discretion, his must determine the question and not ours—the judgment must be affirmed.

Per Curiam.—Judgment affirmed.

Robert W. Sneed v. Edward Lee.

The Superior Courts have a discretion to expunge an order made during the term, and an error in its exercise, cannot be examined upon appeal.

In this case, the plaintiff, on the first day of Johnston Superior Court, went to the clerk's office, paid the costs of the suit, and directed him to dismiss it, which was accordingly done. Afterwards, by the direction of Daniel, Judge, the entry was expunged, and the cause placed on the trial docket. The defendant, by leave of the court, appealed under the act of 1831, c. 34, allowing appeals from interlocutory orders.

Badger, for the plaintiff.

Devereux, contra.

Daniel, Judge.—The records of the court are the memorials of its transactions. Those transactions, thus entered, can be altered or expunged at by the court any time during the term they are entered, as in its discretion it may think proper, just or right. The order made in the present case, was one of those which the Superior Courts have a discretion to allow or refuse. It is an order which this court cannot interfere with, and must stand. I myself, as Judge of the Superior Court,

made it, but now, on further reflection, I think I erred in so doing, as it did not appear that the plaintiff was induced to consent that the clerk should make the entry, by any fraud or contrivance practised on him, or that it was made under any mistake of his rights. A *procedendo* must be awarded.

PER CURIAM.—PROCEDENDO AWARDED.

ALFRED M. SLADE *et al.* v. THE GOVERNOR.

A sheriff, who was elected in June 1826, and who went out of office in June 1827, is bound to collect and account for the taxes due the Treasury, in October 1827, although the tax lists were not handed him until after his office expired.

The case of *Fitts* v. *Hawkins*, (2 *Hawks* 394,) approved.

At the fall term, 1827, of Wake Superior Court, a judgment was entered up against the plaintiffs, at the instance of the Treasurer, for the amount of public tax due on the 1st of October of that year, by one *Griffin*, the sheriff of Martin. A rule was obtained by them upon the *Attorney General*, to set aside that judgment. At the fall term, 1831, the case was submitted to SWAIN, Judge, on the following facts: *Griffin* was appointed sheriff of Martin, June 14th, 1826, and gave the bond upon which the judgment was entered; on the 13th of June, 1827, one *James* was elected his successor, and commenced discharging the duties of the office, having executed the necessary bonds; on the 16th of the last mentioned month, the County Court of Martin passed an order directing *Griffin* to collect the taxes for the year 1826, and that the clerk should furnish him with the tax lists.

Upon these facts, his Honor vacated the judgment, and the *Attorney General*, appealed.

The *Attorney General* for the Governor.

Hogg and *Badger*, *contra*.

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Daniel, Judge.—In England the office of collector of the taxes is distinct from that of sheriff, and filled by a different person. In this state, the office of collector of the taxes, is thrown upon the person who shall be elected sheriff. By the act of 1784, (*Rev. ch.* 219.) it is enacted that "over and above the usual bonds directed by law to be given by the Sheriff of each county, before his entering into office, he shall enter into a distinct bond, with two sureties, to be approved of by the County Court, in the sum of two thousand pounds, to the Governor, conditioned for the due collection, payment and settlement of the public taxes." Which bond the clerk is directed to forward to the Treasurer of the state, together with a list of the taxable property. By the act of 1801, *c.* 3 *s.* 7, the clerks of the several County Courts, shall, within twenty days after the justices have made their returns, issue to the sheriff, on application, an accurate copy of the returns of the list of taxes, and the sheriff shall proceed to collect the same, and shall complete the collection and account therefor, with the public Treasurer on or before the first day of October, in every year. By the act of 1817, *c.* 1, *s.* 5, it is enacted that the clerks of the several County Courts, shall, within forty days, after the justices shall have made their returns, deliver to the sheriffs of their several counties a copy of the returns of the lists of taxes, made by the justices. The justices who take the list of taxables, are to make their returns to the first County Court, which may happen after the last day of July, in each and every year. In forty days thereafter, it is the duty of the clerk to have copies of the lists of taxes prepared, and delivered to the sheriff. The law for greater security, makes it the duty of the sheriff, to make application to the clerks for the tax lists. By the aforesaid act of Assembly of 1817, the sheriffs shall proceed, after the first day of April in each and every year, to collect the taxes, and shall account for the same on or before the first day of October thereafter, in each and every year.

The office of collector of the taxes does not expire when that of sheriff does; the last terminates at the end

of twelve months from the time he qualified as sheriff, whereas the former does not begin, (except where a person liable to pay a tax is about to move away,) until the first day of April, in the year after he has been appointed sheriff: and by law he is not compellable to collect the taxes, even until after the office of sheriff expires. As collector of the taxes, he must account with the Treasurer, on or before the first day of October, in the year following that, in which he qualified as sheriff. *Griffin*, was elected to the office of sheriff of the county of Martin, at June sessions of the County Court, in the year 1826. He gave bond and surety to perform the duties of sheriff. He also gave another bond with surety, to perform the duties of collector of the public taxes. His office of sheriff began immediately on his qualification, and expired at the end of one year from that time. His office of collector of public taxes began immediately, so far as related to taxes, that might be due and not listed, as for instance, those imposed on pedlars, showmen, and venders of slaves brought from other states, &c. but he had no right to enforce payment of the dues on the lists of taxes, (except where a person was about to remove,) before the first of April, in the year next after his appointment, nor was he bound to settle with the Treasurer, before the first day of October thereafter. No breach of his bond, for the due collection of the taxes, could take place, until a failure to settle with the Treasurer on the first of October, 1827. In case of failure, the condition of the bond was broken, and the Treasurer had a right by law, to enter up judgment against him and his sureties, for the amount of those taxes, which he should have collected before that time.—*Griffin* was authorized and bound by law, to collect the taxes. The order made by the County Court of Martin directing him to collect them was a mere nullity: it gave him no more power than he had before it was made.—The sureties to his bond, for the collection of the taxes and settlement with the Treasurer, were bound until those duties were performed. On *Griffin's* failing to settle for the public taxes, the Treasurer could not have

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taken judgment on any other bond than the one to which the plaintiffs are sureties. The succeeding sheriff had no right to collect the taxes that were due for the time that *Griffin* was appointed collector. Nor would the sureties of the succeeding sheriff have been liable, if their principal had collected those that were due, during the year that *Griffin* should have collected. (*Fitts* v. *Hawkins*, 2 *Hawks* 294.) The act of 1784, (c. 2, s. 12.) authorizes sureties, to the sheriff's collection bond, to receive the taxes, if he should die during the time appointed for their collection. By the act of 1792, c. 69, all persons who are authorized to receive the public taxes, may collect and distrain for the same, within one year, after such sheriff or collector is accountable for said taxes, in as full and ample a manner as they could have done when they became due. By the act of 1800, c. 4, sheriffs are allowed one year, after the day prescribed by law for the settlement of their public accounts, to finish the collection of the taxes they are bound by law to account for: with a proviso, that they still must settle with the Comptroller and Treasurer, as heretofore. The obligation in the bond given by the plaintiffs in this case, did not terminate when *Griffin* ceased to be sheriff of Martin county, in June 1827, but those obligations continued until payment should be made to the Treasurer for the public taxes, due 1st of October, 1827. The taxes were not paid, and the Treasurer had a judgment entered up against *Griffin* and his sureties; which judgment was properly and legally rendered. The judgment of the Superior Court should be reversed.

Ruffin, Judge.—The case of *Fitts* v. *Hawkins*, (2 *Hawks* 394,) seems to be an authority upon every point that can be made in this case. We do not go through the acts of assembly about taxes, because they were looked into and received a construction in that case. It was there decided, that the sheriff appointed in 1826, was the proper officer to collect the tax of that year; and that if the successor had actually collected them, *his* sureties were not bound. That suit was against the sure-

ties for the year in which the taxes were collectable and collected; and it was decided for them. This of itself goes far to establish the liability of the sureties for the preceding year; for it is incredible that the Legislature should mean, that upon a change of sheriffs, there should in any possible case be no authority to collect the taxes, or no security for them when collected.

But it is said, that here there is a difference, because the authority to the sheriff, namely the tax list which is his warrant of distress, was not delivered until his official term had expired, and then he could not begin to act on it; and therefore his sureties are not liable.

It does not appear in *Fitts* v. *Hawkins*, whether the lists for 1820 were delivered before or after May, 1821. But the case is clear, that it could make no difference. For the Chief-Justice states, that if the new sheriff receive the lists and collect the taxes, it must be in consequence of a private arrangement between him and his predecessor; which would not bind his sureties, and make them responsible for two years instead of one. The new sheriff then, has no authority to collect the taxes, even if the lists be delivered to him. He is not the shriff to whom they are directed; and it is the same as if he were to take them, not being sheriff at all. This I have said, nearly establishes the power and the duty of the former sheriff: for the law must intend, that the tax shall be collected by some body. But it is put beyond doubt by the provisions which authorize the sheriff, to make those collections, and distrain for them at any time within a year, after he is accountable at the treasury. Thus, for this purpose, his official term is extended beyond his first year, during which only his ordinary official duties continue. The argument, that the duty must begin during the year, and here it did not, because the list was not delivered to him within it, is fallacious. The duty commenced when he ought to have received the lists. It is true, he cannot distrain without the lists; but that is for the benefit of the citizen, that he may see what he is to pay. But the sheriff is the agent of the public to demand the lists and it is his

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duty to do so, as much as of the clerk to deliver them; and he cannot avail himself of his own laches. Indeed the public is not to suffer by the laches of either, and might go on to collect the tax, though the clerk refused to deliver, or the sheriff to receive the lists—whether indeed the sheriff would be liable, if the clerk upon his demand refused the lists, is a different question. No doubt, he would not; and probably after a refusal by the clerk, the sheriff might not afterwards be bound to receive them, unless offered at a time which would allow a reasonable period for the collection, before he had to account. But here there is nothing of that sort. It is not pretended that the sheriff might not have collected, or did not in fact collect the tax. The only ground is, that he had no authority to collect it, or receive the list at the time he did. And upon that it is clear, that as no other officer then had, or could have that authority, and the tax list was delivered to *Griffin* and accepted by him, at a time when, by law, he could distrain, his sureties are responsible. *Griffin* was the person designated by law to collect: and the previous negligence of himself and the clerk, or either of them, did not prejudice the right of the public, as against the citizens, to levy the tax, nor that against *Griffin* to account for the tax, the warrant to collect which, he thus accepted, while he yet had power to enforce it. It is not like process from an individual, of which the officer can know nothing until he receives the writ. But the sheriff knows, that by law, a tax is levied and that he is to collect it, and in what manner he is to get, or complete his authority; and it is a breach of his duty to fail in any particular.

PER CURIAM.—JUDGMENT REVERSED.

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THOMAS D. CRAIN v. RICHARD H. LONG.

A discharge of an insolvent, under the act of 1822, (*Taylor's Rev. ch.* 113) protects him from arrest, by those creditors only, who had notice of his intention to apply for it.

The defendant had been arrested upon a *ca. sa.* at the instance of the plaintiff, and on the last circuit, at Halifax, applied for a discharge, upon the ground, that he had been arrested at the suit of one *Bullock*, and had then taken the insolvent debtors oath, and surrendered his property. It was admitted that the debt of the plaintiff was due at the time of that surrender, and that he had no notice of the defendant's intention to take the oath of insolvency. His Honor Judge NORWOOD discharged the defendant, and the plaintiff appealed.

No counsel appeared for the plaintiff.

Devereux for the defendant.

RUFFIN, Judge.—The case of *Burton* v. *Dickins*, (3 *Murph.* 103) was decided expressly on the grounds, that the act of 1773, (*Rev. ch.* 100) provides for notice to the imprisoning creditor only, and divested the whole of the debtors property. Although it was deemed just, that every creditor to be affected by his discharge, should have notice, yet as the Legislature had, after the adoption of the Constitution, made no regulation to that effect, and the act of 1773 contained none, the court was obliged to say, that a discharge of the motion, provided under that act, should operate against all creditors; because the debtor might be perpetually imprisoned by successive executions by different creditors, against whom he had no power by the act, of protecting himself. But the act of 1822, (*Taylors Rev. ch.* 1131) expressly requires notice and makes the discharge good only as against those to whom it is given. It puts it in the power of the debtor to protect himself, if he chooses; and if he will not give notice, it is his default, and not the defect of the law. He is not imprisoned after a surrender of his pro-

The case of *Burton* v. *Dickens*, (1 *Murphey* 103,) approved.

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perty "in such manner as by law shall be regulated." In this statute, the great principle that every man shall be heard, before his rights are concluded, is enforced.—When the expression "duly discharged" is so emphatically commented on by the counsel, the question is begged. It remains to inquire, against whom? It is a due discharge as to the parties in court; but it is not so, as against those not heard, and excluded from a hearing by the act or omission of the debtor himself. It is plain that an issue is given to "any creditor" to be affected by the order of discharge; and that the assignment is of the estate in the schedule only—nothing else is divested out of the debtor; and every creditor ought to be at liberty to shew that the debtor has kept some back. In fine, the Constitution gives to the Legislature the discretion to regulate the manner in which the debtor shall deliver up his property; and their will is conclusive when expressed. It only restrains them from saying, that when delivered up, he shall not be discharged. If a statute therefore takes all away, without providing for a notice to particular creditors, the debtor has a right to say, that he shall not be liable for debts, the means of satisfying which he is deprived of by law, and that the Legislature is bound to authorize a notice to all creditors, or the Constitution binds them without it. But when the law does provide for such notice, there can be no complaint against it; for its omission is the voluntary fault of the debtor himself.

Per Curiam.—Judgment reversed.

The State v. The Bank of Newbern.

Stock standing on the books of the Bank of Newbern, in the name of the President and Directors of the Literary fund, is stock held by the state, within the meaning of the act of 1814, (*Rev. c.* 870 *s.* 11) extending the charter of that bank; and therefore, not subject to taxation.

A difference of opinion having arisen between the Treasurer and the Bank of Newbern, as to the obligation of the bank to pay the tax of one per cent. upon shares in

the bank held by the President and Directors of the literary fund; the bank contending that the stock held by the latter, was, to all intents, stock held by the State, within the meaning of the eleventh section of the act of 1814, (*Rev. c.* 870): The question was submitted to Judge NORWOOD at Wake, on the last Spring circuit, in the shape of a case agreed. His Honor holding that the stock of the literary fund was the stock of the State, gave judgment accordingly, and the Attorney General in behalf of the State, appealed.

The case was submitted, without argument, by the *Attorney General* for the State, and *Gaston* for the Bank.

RUFFIN, Judge —There is but a single question submitted in this case, and upon that, no doubt is entertained by the court. No tax can be levied on or for any stock holden by the state, by the express terms of the 11th section of the act of 1814, which imposes the tax of one per cent. on the stockholders in the Banks of Newbern and Cape Fear. The remaining enquiry is, whether this stock, which stands in the name of the President and Directors of the literary fund, is stock held by the State, within the meaning of the charter. We think it is. The act of 1825 was passed, to create a fund for the establishment of common schools. The object is one of general and public concern, and is to be effected by the general and public treasure. It is the legislative will, that the income arising from certain sources of revenue, shall be set aside for that purpose, until it shall, in the opinion of the Legislature, have sufficiently accumulated for division and particular appropriation amongst the several counties. To facilitate the keeping of the accounts of it as a seperate fund, and to promote its accumulation, certain of the high officers of the state, are appointed trustees of it, with directions to invest it from time to time in stock; and to that end are endued with corporate powers. But it is still a public fund, received by the treasurer and accounted for by him; it is under the control of the Legislature, and may be by their will, increased, diminished, divested, or annihilated. No pri-

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vate rights have attached to the fund, or vested under the law creating it, or any one subsequently passed. It is to all i ents the common property of all the citizens of the State; and therefore, belongs to, and is held by the State. It was not the legislative design to vest it in a corporation for private uses; but simply to distinguish it from other parts of the public property, as ultimately designed for a special public use.—That this might be conveniently done, it received the designation given to it in the act. But that does not change its character or ownership. If it be not the property of the state whose is it? If by the act of 1814, the tax is on each individual stockholder, to be paid by the President or Cashier, out of the funds arising from, or constituting his share or shares, it is plainly absurd, to require a particular portion of the public property, to contribute to the fund for general expenditure. If, on the other hand, the tax is to be paid by the corporation out of the aggregate profits or funds, and the amount only ascertained by the number of private stockholders, that amount must be diminished by one per cent. per annum, upon each of these shares, which are not private property.—It is not necessary to decide which is the true construction of the charter on this point; for upon either, the judgment ought to be affirmed.

Per Curiam.—Judgment affirmed.

Thomas Trotter v. Margarett Selby.

Where the heir has land descended from both parents, a creditor cannot sell that descended from the mother, under a judgment against that descended from the father, although the mother held as devisee of the father.

This was a petition for partition, which was submitted to Daniel, Judge, at Beaufort on the last circuit, upon the following case agreed:

The demandant had obtained a judgment against *Benjamin M. Selby*, the executor of *Maurice Jones*; *Selby* having wasted the assets, the demandant in 1822, brought a *sci. fa.* against *Sarah* and *Mary E Jones*, the wife and daughter, and devisees of *Maurice*, seeking to obtain satisfaction of his judgment, from the devised lands; in 1823, *Sarah*, the widow of *Maurice*, died intestate, leaving *Mary E. Jones*, the daughter of *Maurice*, and the defendant, a daughter by a second marriage, her only children. No notice of her death was taken, upon the record of the demandants suit by *sci. fa.* In 1825, the demandant amended his *sci. fa.* filing a new one, as a substitute for the former, and as of the same *teste*, (1822) against *Mary E. Jones* alone, which suggested "that *Maurice Jones* died, seised of land which descended to the said *Mary*" and summoned her "to show cause, why the said *Thomas Trotter*, shall not have execution for his said debt against the said lands, so descended as aforesaid." Upon this *sci. fa.* final judgment was given, "that the plaintiff have execution against the lands that were of *Maurice Jones*, of which he died seised:" and execution issued against those lands, "in the hands of *Mary E. Jones*, the heir of *Maurice Jones*." Under this execution, the plaintiff purchased the land in dispute, which was a tract devised by *Maurice Jones*, to his wife *Sarah*. Upon these facts, his Honor gave judgment for the defendant, and the demandant appealed.

Hogg and *J. H. Bryan* for the demandant.

Gaston, contra.

RUFFIN, Judge.—It is argued for the plaintiff, that the sale was good, because the land was liable in the hands of *Mary E.* in whatever manner it came to her, and therefore, the pleadings need not shew how she was heir, or how she otherwise claimed the land. That the proceeding against real estate is considered to be *in rem*, and the only reason for bringing in the person is to contest the debt, the state of the personal assets, or the insolvency of the executor.

The principles asserted are not clearly perceived by the court to be entirely correct; for it may be that the

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devisee paid debts to the value of the land, and would have a right to shew that, although she could not plead generally "nothing by devise." But it is unnecessary to pursue that investigation, because if the proceeding be regarded as *in rem*, as strictly as if it were on a statute or recognizance in England, the process must be served on, and bring in the person *then* claiming and enjoying the thing sought to be condemned. That person is the one to defend it—Hence, those who are the terre-tenants must be summoned. When this suit was brought, *Mary E.* was not seised of these lands. They belonged to her mother, and could not have been sold under a judgment against the daughter, if the mother had survived the judgment; neither can they, as against any person succeeding to the mother's estate. They never have been defended. It is true, *Mary E.* was before the court; but the lands which descended from her father to her may not have been worth a contest, or may have been sold for other debts; or indeed, none may have descended to her, and so she could not have been injured. It may be, that the heir need only be named as terre-tenant; but if one having a several interest, die pending the suit, his share cannot be sold under the judgment, unless the suit be revived against his heir, which may be done, I suppose, though the heir of the one dying, be not also the heir of the first debtor.

But if the process and judgment could have been so framed as to extend to these lands, thus acquired by the defendant in that suit pending it, they have not. They embrace in terms only, "lands of which *Maurice Jones* died seised, and which descended from him to *Mary E. Jones* the heir of *Maurice*." Now although it might not have been necessary to name her as heir of *Maurice*, and allege that the land came to her in that character, yet when she is named as heir of one, and the pleadings do not designate the land by boundaries or other means, than as being held by her as the heir of the particular person mentioned, the plaintiff is bound by the description, and cannot sell under that judgment land claimed in another right: and especially when that right has accrued after action brought.—Per Curiam.—Judgment affirmed.

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ZACHARIAH ELLIOTT v. WILLIAM HOLLIDAY.

Ignorance of the act of 1777, (*Rev. c.* 115, *s.* 75,) requiring appeal bonds to be executed in the court where they were allowed, will not entitle the appellant to a *certiorari*.

A cause between the parties had been tried in the County Court of Greene, where judgment was rendered for the plaintiff, and the defendant prayed an appeal, which was granted, and his sureties allowed. At the ensuing term of the Superior Court, before MARTIN, Judge, the plaintiff moved that the appeal be dismissed, because the appeal bond was not executed until after the term of the County Court at which it had been allowed. This fact being established, his Honor sustained the motion. The defendant then filed an affidavit, in which he swore that he was ignorant of the rule requiring the appeal bond to be executed during the term of the County Court; that he thought it sufficient if the appeal was allowed by the court, and that the bond might be executed at any time; that he had brought his sureties to the clerk during the term, but finding him busy, he had, in consequence of his erroneous impression, requested them to attend after its expiration. The affidavit concluded with an averment of merits. His Honor upon these facts, awarded a *certiorari*, from which order the plaintiff appealed.

W. C. Stanly, for the plaintiff.

Mordecai, for the defendant.

DANIEL, Judge, after stating the substance of the affidavit, proceeded: The act of 1777 (*Rev. c.* 115 *s.* 75.) requires the appellant to enter into bond, with two sufficient sureties before obtaining his appeal. The court is not only to judge of the sufficiency of the sureties, but to take the bond. The defendant does not come within any of the cases decided in this state. (*Chambers* v. *Smith*, 1 *Hay.* 366. *Collins* v. *Nall, ante* 3 *vol. p.* 224.) There does not appear to be any misconduct either in the court, or the clerk, no management, fraud, or contrivance by the ad-

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verse party, nor any inability in the applicant to give sureties during the term. The only reasons offered, are, that the defendant was ignorant of the law, and that the clerk was very busy, and he did not wish to disturb him. It is a rule, that ignorance of the law excuses no man. If we were to sustain the *certiorari*, it would be opening the door for great negligence and fraud in parties applying for appeals, and perhaps perjuries in making affidavits. We think the order awarding the *certiorari* should be reversed.

Per Curiam.—Judgment reversed.

Arthur Jones v. Lewis Sasser.

Notwithstanding the act of 1806 (*Rev. c.* 701,) requires deeds of gift for slaves to be registered within one year of their date, yet if registered within the time prescribed by the acts allowing longer time for that purpose, they are valid.

Detinue, for a slave, tried on the last circuit, at Wayne, before Daniel, Judge. Plea—*Non detinet*. A number of points were intended to be presented by the case certified with the record; none of which it is necessary to state, except the following: The plaintiff claimed the slave in dispute under a deed of gift from his father, *Arthur Jones* sen. dated April 5th, 1827, which was not registered until February 20th, 1830. The defendant claimed under a deed from the same person, dated August 5th, 1829, which was registered January 10th, 1830.—His Honor instructed the jury, that as the plaintiff claimed under a deed of gift, no title passed by it until it was registered, and until that took place, that the title remained in his father; that if the latter retained the possession until the deed of August 1829, the execution of that deed, and its prior registration, gave the defendant title, which would not be divested by the subsequent registration of the deed to the plaintiff.

A verdict was returned for the defendant, and the plaintiff appealed.

J. H. Bryan and *Mordecai*, for the plaintiff.

Gaston and *W. C. Stanly*, *contra*.

RUFFIN, Judge.—By the act of 1806, (*R.* c. 701.) no gift of slaves is good or available, unless made in writing. "Neither," the act continues, "shall such gift be valid, "unless the writing shall be proven or acknowledged, "and registered within one year after the execution "thereof." These words seem to denote a purpose in the legislature, then to make the registry acts effectual, at least, in reference to the gift of slaves. Perhaps no purpose could be more politic; for registration is now scarcely of any use, except as a means of preserving the instrument for the benefit of the person claiming under it, in case of the loss of the original, as the party may keep the deed in his pocket as long as he pleases, and place it on the register's books only when it becomes his interest to defeat some claimant, who has, ignorant of his deed, acquired a right. Probably these strong reasons induced the judge in the court below, to lay down the rule he did. But they are reasons, which address themselves rather to the discretion of the legislature, than to ours. The legislature has certainly the power to enlarge the time for registration, and to pronounce its effect, and if to them it seem good, the courts must execute their will. From time to time, acts giving further time for registration have been passed; and in each, deeds of gift, and indeed all conveyances, except mortgages and deeds of trust, are expressly included; and it is enacted, that they shall be as good and valid, as if they had been proven and registered within the time before allowed by law. Such are the words of the acts of 1827, c. 30, and 1829, c. 26, which embrace the case now before us. Acts of this character, have always received a literal construction; in fact, they are susceptible of none other. The only exception is the case of *Scales* v. *Fewel*, (3 *Hawks*, 18,) in which there was an hiatus of one year between the extending acts of 1818 and 1821, and during the interval, rights vested in other persons. The court thought the last act was not intended to defeat such vested rights. But in every

The case of *Scales* v *Fewel*, (3 *Hawks*, 18,) approved.

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other case, deeds registered at ever so remote a period, have been held, by force of the new registry acts, to be as operative as if registered within the periods prescribed by the acts 1715 or 1806, or any other general statute. Here there was no interval.

PER CURIAM.—JUDGMENT AFFIRMED.

GABRIEL SHERWOOD *upon the relation of the* STATE BANK,

v.

PROBATE COLLIER.

Where a surety in a joint note paid it, but took no assignment from the creditor, of a judgment previously obtained upon it against the principal debtor: *Held*, that the payment satisfied the judgment.

DEBT upon a bond, given by one *W. B. Green*, upon taking out letters of administration upon the estate of *Benjamin W. Caswell*, to which the defendant was surety. The breach assigned, was the non-payment by *Green*, of a judgment recovered against him by the relators, upon a note of his intestate. Plea—*Performance*.

On the trial, during the last Spring Circuit, before MARTIN, Judge, at Wayne, the case was as follows: The intestate died in 1815, indebted to the State Bank by a note for $630, to which one *Hooks* was surety; in the year 1816, judgment was recovered by the bank, upon this note against the administrator, *W. B. Green*, and an execution issued, which was returned *nulla bona*. In the year 1818, the bank also recovered judgment against the surety *Hooks*, which was satisfied by him in the year 1823. This action was commenced in the year 1829. Upon these facts, his Honor instructed the jury that the payment by *Hooks* barred the action. The plaintiff, in submission to this opinion, suffered a nonsuit and appealed.

J. H. Bryan and *Mordecai*, for the plaintiff, contended, that the jury should have been directed to find for the plaintiff, if they should think that *Hooks*, when he paid the judgment against him, intended a purchase and not

a satisfaction, and cited *The Governor* v. *Griffin*. (*Ante* 2 *vol. p.* 352.) They also urged, that satisfaction of the judgment against the endorser, was not *per se*, satisfaction of that against *Green*, the administrator of the principal debtor, and for this was cited *Clason* v. *Morris*. (10 *John. R.* 524.)

Gaston and *W. C. Stanly, contra*, were stopped by the court.

RUFFIN, Judge, after stating the case, proceeded as follows:

I suppose the present action is brought for the benefit of the surety *Hooks*, to avoid the effect of the statute of limitations, or a disbursement of the assets subsequent to the judgment of the bank against *Green*, which might prevent an effectual recovery in a suit in *Hooks'* own name.

But in the case stated, I think the present action equally ineffectual. Since the statute of 4th *Ann*, payment discharges a judgment, as effectually as entering satisfaction of record. Here there was full payment. It was intended as such by *Hooks*, and so received by the creditor. A payment by any one of two or more, jointly, or jointly and severally bound for the same debt, is payment by all; and any of the parties may take advantage of it and plead it to an action brought by a satisfied creditor, or in his name by the sureties. It is true, that if a payment be not intended, but a purchase, there is a difference. But that can only be by a stranger, or by using the name of a stranger, to whom an assignment can be made when there is but a single security, and that, one upon which all the parties are jointly liable. This is upon the score of intention, and because the plea of payment by a stranger is bad upon demurrer. If the assignment of a joint security be taken by the surety himself, there is an extinguishment, notwithstanding the intention; because an assignment to one, of his own debt, is an absurdity. Where the securities are separate, as several bonds, or a several judgment upon a joint and several note, which is the case here, probably an assignment

An assignment of a security to one of the parties to it, is a satisfaction—if it is intended to keep it on foot, the assignment should be to a stranger.

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may be made to the surety himself, since he is no party to the judgment. But if that can be, clearly nothing but a plain intention, evinced by an assignment, to keep up the judgment, can have that effect. Upon the face of the transaction, it is a payment, on which *Hooks* could have maintained assumpsit in his own name. That shews that this suit is barred; for if it be not, the original creditor, and the surety, may both recover the same debt.

The case of *Hodges* v. *Armstrong*, (*ant* p. 253,) approved.

This case is just the reverse of *Hodges* v. *Armstrong*, (*ante* 253.) That suit was brought in the name of the surety, who had taken an assignment to a stranger, and did not intend a satisfaction. This, in the name of the first creditor, who has received payment, and did intend a satisfaction. Both decisions are on clear grounds, and are supported by numerous authorities; amongst them, I recollect *Church* v. *Bishop*, (2 *Ves.* 371,) and *Watlington* v. *Sparks*. (*Id.* 569.)

PER CURIAM.—JUDGMENT AFFIRMED.

ENOCH COBB v. GRADY HERRING.

Where, upon the case stated, the judgment of the court below is correct, points which were intended to be presented do not arise, and will not be examined; as where in trespass, the plaintiff was in possession, and the defendant had no title, defects in that of the former will not be noticed, he having recovered upon his possession.

TRESPASS QUARE CLAUSUM FREGIT. Plea—*Not guilty*, and *liberum tenementum*. The plaintiff claimed under one *Whitfield*, to whose title the case stated several objections, which it is unnecessary to mention. *Whitfield* had been in possession for many years, and in January 1830. sold to the plaintiff, who took immediate possession, but no conveyance was stated in the case to have been made by *Whitfield* to him. The defendant offered no evidence of title in himself. The trespass complained of was, in entering an enclosure and

throwing down a fence. MARTIN, Judge, before whom the cause was tried at Wayne, on the last spring circuit, after charging the jury as to the alleged defects in the title of *Whitfield*, informed them, that if the plaintiff had actual possession, and not constructive possession merely, and the defendant entered upon him, in the manner stated in the case, without even a color of title, they ought to find for the plaintiff. A verdict was returned accordingly, and the defendant appealed.

W. C. Stanly and *J. H. Bryan*, in opening the case, were asked by RUFFIN, Judge, if the questions intended to be presented as to *Whitfield's* title, were open upon the case certified with the record? Upon a clear intimation of the opinion of the court, they gave up the cause.

Mordecai, for the plaintiff.

RUFFIN, Judge.—Most of the points on which the jury were instructed, would have been material if the action had been brought by *Whitfield*, and had turned on his having a better title than the defendant. But they are out of the present case; because it is immaterial whether the title was in *Whitfield* or not, since no conveyance is stated from him to the plaintiff. The right of the present plaintiff to recover, must therefore have depended solely on his actual possession, at the time of the trespass committed; and the judge properly said upon that point, that if he had not such possession, he could not recover; but if he had, then without title, he had a right to a verdict against the defendant, who was a mere wrong doer.

It may be possible, that it was intended to take the opinion of the court upon *Whitfield's* title, and to that end, to state a conveyance from him to *Cobb*, which would have brought that title in issue, in case the plaintiff had not the actual possession. But a case is not made to call for that opinion; for it is only stated that *Whitfield* sold to *Cobb*, but whether he conveyed, or by what species of conveyance, does not appear. As therefore the jury have found a verdict for the plaintiff, which, in the case stated, and under the instructions given by the

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judge, they could have done upon the single ground of his own possession, and upon that alone, we must presume, that such possession was proved to them; and if so, the verdict and judgment was right. The case as to that, states, that the plaintiff purchased from *Whitfield* in January 1830, and the trespass was on the 2d February, and that the plaintiff "had been in possession since the time he purchased." If this means "ever since," the plaintiff was entitled to recover; and since the verdict under this charge, we must take it to mean that.

PER CURIAM.—JUDGMENT AFFIRMED.

THOMAS THREADGILL *upon the relation of* HEZEKIAH HOUGH v. HIRAM JENNINGS *et al.*

A bond to the chairman of the County Court, his "executors, &c." is not an office bond for want of the words, "successor, &c." But it enures as a private bond, and a delivery to the clerk is sufficient, unless the obligee refuses it, although the clerk is the agent of the chairman as to office bonds only.

DEBT upon a bond given by *John T. Scott* and *Hugh McKenzie*, upon taking out letters of administration upon the effects of one *Samuel Knox*. Plea—*Non est factum*. On the trial, before DANIEL, Judge, at Anson, on the last circuit, the plaintiff produced the bond, which turned out to be made payable to "*Thomas Threadgill*, chairman, his executors, administrators, &c." instead of "his successors in office," as prescribed by the act of 1791. (*Rev. c.* 342.) There was no attesting witness to it; the plaintiff proved the hand writing of the obligors, and the deputy clerk of the County Court swore that he found it among the files of the office, but that he recollected nothing of its execution. For the defendant it was objected, that as the bond was not an official bond, but only a private obligation, entered into with the plaintiff as an individual, there was no evidence of an actual delivery to him, or to any one for him; that although the

clerk of the County Court might be presumed to be the agent of the chairman, in accepting the delivery of official bonds, he could not be so presumed in respect to bonds payable to him in his natural capacity. His Honor being of this opinion, nonsuited the plaintiff, who appealed.

No counsel appeared for either party.

DANIEL, Judge.—Two questions arose on the trial of this cause in the court below; first, whether the bond declared on, was an official bond, and might be sued on by the successors of *Threadgill*, who, it appears, was chairman of the County Court of Anson. On this point, I was of opinion that it was not an office bond, as it was not made payable to *Threadgill* and his successors in office, but to him and his personal representatives.—The anonymous case in *Haywood's Reports*, (1 *vol. p.* 144,) is not an authority against that opinion, as there the instrument declared on, was intended to be an office instrument, and no one but the successor could have sued on it, as the instrument had on its face no words which denoted that it was intended to be an individual covenant. In the present case, the bond has such words in it, and the word "successors," which if inserted, would have made it a good office bond, is omitted. The second question was, whether the delivery of the bond to a stranger, with an intent that it should be delivered by the stranger to the obligee in his official capacity, would nevertheless, upon its delivery, make it a good individual obligation. A deed is good if delivered to a stranger, to the use of the obligee. But if it be delivered to a stranger without any such intention, (unless it be delivered as an escrow,) it seems this is not a sufficient delivery. (*Sheppard's Touchstone*, 57. 58. 2 *Thomas' Coke*, 225, *note m.*) The case of *Fitts* v. *Green*, (*ante* 291,) was relied on for the defendant in the court below, and it had great influence in determining the case. But upon more mature reflection, I think that it was immaterial, in what character the obligee was to take the bond. The question for the jury to determine, was,

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whether the obligor delivered the instrument to any person, (be that person a stranger or not.) with an intent that it should be delivered to the plaintiff. If the intent was, that the plaintiff should receive it, and he did thereafter receive it, the bond then was good from its delivery to the stranger. The direction to the jury, to enquire whether the obligors intended the instrument should be delivered to the plaintiff, and if they did, whether they intended that it should, after its delivery, operate in law as an office bond, and not as an individual bond, I now think was improper. The jury should have been simply instructed to enquire, whether the instrument was placed in the hands of the clerk, with an intention by the obligors, at the time it was thus delivered that it should be delivered over to the plaintiff. If the jury should find the fact of intention to deliver, and that in pursuance of that intention, it was delivered to the plaintiff, then the effect which the law would afterwards give the instrument, ought not to have been regarded by them, in ascertaining the isolated fact, whether or not the obligors intended the plaintiff should have the instrument as their deed. If the obligors intended to deliver the instrument to the plaintiff as their deed, and if it afterwards came to his hands, it then was their deed, notwithstanding their ignorance of the fact, that in law it was not an office bond. The obligors are not to be heard to say they were ignorant the law would make it good as an individual bond, when it was invalid as an office bond. I think a new trial should be granted.

Ruffin, Judge.—It is not certain, that the jury could not infer that the clerk was the agent of the plaintiff for accepting the delivery of the bond, although it be not strictly in the form required by the statute. The purpose of giving it is obvious from its terms. It was intended to have the same operation as one which conformed to the act of assembly; and it is no great stretch to presume, that the chairman of the court authorised the clerk to accept any obligation, made to secure the faithful administration of the assets. But this case

does not depend upon the agency of the clerk; if he be a stranger, the bond was the deed of the obligors at the time of the plea, as the obligee had not, before that time refused it. That is the rule laid down by Lord *Coke* in *Butler* and *Baker's case*, (3 *Rep.* 28,) and again in *Whelpdale's case*. (5 *Rep.* 119.) It is founded on the presumed assent of the party to whom the deed is made, from the advantage accruing to him under it. There is a very strong case of the application of this principle. If a deed be made to a married woman, she can neither expressly assent or dissent during her coverture. She has not capacity for either: but may dissent when she becomes discovert, which avoids the deed *ab initio*. Yet in the mean while, the deed operates, and vests the title in her; because the law presumes for her benefit, that she will assent when she can—at all events, until it be refused, it is a deed. The case of *Fitts* v. *Green*, (*ante* 291,) was decided upon the ground that the bond was not complete; that is, that it was not what all the parties intended it should be, before it was delivered by one, or accepted by the other. Something more was to have been done, and therefore, without express evidence of delivery in the state in which it then was, none could be presumed.

PER CURIAM.—JUDGMENT REVERSED.

DEN *ex dem.* WILLIAM R. SMITH *v.* JOHN M. GREENLEE.

Rules made by consent, after an order for the removal of a cause, but before it is removed, are not erroneous.

An affidavit, for the removal of a cause, adjudged to be sufficient.

EJECTMENT, tried on the last Spring Circuit, at Rutherford, before DONNELL, Judge.

The cause was originally commenced in Buncombe, and notices were served upon *James M. Greenlee*, *Henry Anderson* and *Stephen Edwards*, the tenants in possession. *Greenlee* alone entered into the consent rule, and was

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made defendant. At the return term, the following affidavit was filed by *James M. Greenlee*, upon which, the cause was removed to Rutherford:

"The defendant swears, that he cannot have a fair and "impartial trial in this county, owing to the great pre- "judice existing against him; that the lessors of the "plaintiff are men of great influence in this county, and "this affiant believes they will exercise their influence "to his prejudice."

Immediately after the order for removal, the following entry appeared upon the record:

"And afterwards, to-wit, on the same day and year, "came *John M. Greenlee*, by &c. and by and with the "consent of the plaintiff's attorney, and by and with the "assent of the court now here, the said *John M. Greenlee* "is admitted to defend the cause in the room and stead "of the said *James M. Greenlee*."

A verdict was returned for the defendant, which the plaintiff moved to set aside,

1st. Because the affidavit for the removal, was not filed by, or for the defendant of record.

2d. Because the affidavit was insufficient to warrant the removal.

3d. Because *John M. Greenlee* was improperly made a defendant, as the court had no power over the cause after the order of removal was made.

The presiding judge overruled the motion and gave judgment upon the verdict, and the plaintiff appealed.

No counsel appeared for the plaintiff.

Badger, for the defendant, submitted the cause without argument.

Daniel, Judge, after stating the entries above set forth, proceeded as follows:

As to the first point, it appears that *James M. Greenlee* was the defendant at the time he made the affidavit, and when the order of removal was entered.

Upon the second point, we are of opinion, that the affidavit contained matter sufficient to justify the remo-

val of the cause. The record of the cause was not to be sent from Buncombe to Rutherford until the ensuing term of the Superior Court of the latter county: the Superior Court of Buncombe could, while the cause remained there, make any orders in it by consent: this appears to have been the case with the order now complained of. Were it erroneous, the consent of the parties prevents them from objecting to it now. Upon looking through the record, we think the judgment should be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

SPIER WHITAKER v. JOHN B. CAWTHORNE.

An unsealed memorandum given by the owner of land, stating that A is the owner of a house upon the premises, and authorizing its removal, is a mere license to enter, and is revoked by a subsequent conveyance to B.

TRESPASS QUARE CLAUSUM FREGIT, and upon *not guilty* pleaded, on the trial before DANIEL, Judge, at Warren, on the last Spring Circuit, the case was, that one *Robert Ransom*, in the year 1826, bought the premises in dispute of one *Robert R. Johnson*, from whom, he received an absolute deed, and to whom he gave the following memorandum, which was without a seal: "I "*Robert Ransom* agree that the stable next, &c. which "belongs to *Robert Johnson*, may be removed at any "time he pleases, which stable was reserved by said "*Johnson*, in his sale, &c." The plaintiff claimed under an absolute deed from *R. Ransom* to *James Ransom*, and the defendant under a sale of the stable from *Johnson's* administrators. The trespass consisted of an entry by the defendant, and the removal of the stable.

The jury under the direction of his Honor, returned a verdict for the plaintiff, and the defendant appealed.

Devereux, for the defendant, cited *Van Rensalaer* v. *Van Rensalaer*, (9 *John. R.* 377.) *Taylor* v. *Waters*, (2 *Eng. C. L. R.* 140.) *Tillotson* v. *Preston*, (7 *John. R.* 285.)

Badger, contra.

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DANIEL, Judge, after stating the case, proceeded: The word "land, legally includeth all castles, houses and other buildings, so as passing the land or ground, the structure or building thereupon passeth therewith." (1 *Thomas' Coke*, 197.) "If a man grant all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his waters, and his houses, as well as his fields and meadows." (2 *Bl. Com.* 18.) The word "land," includes not only the face of the earth, but every thing under it or over it. The stable was fixed to the land, and was in law a part of it. It could not be, nor was it severed by the unsealed writing which *Ransom* gave to *Johnson*. It remained as part of the land, and passed under the deed to *James Ransom*, and again it passed with the land, by the deed to the plaintiff. The written license given by *Ransom*, might have excused a trespass committed in entering and taking the stable, whilst he was the owner of the premises. It did not operate as a conveyance of the stable; for the stable being a part of the realty, could not pass, except by such a conveyance as would pass the land. A license to commit a trespass, is a very different thing from a conveyance which will pass the land, or any of its appurtenances. When *Ransom* sold the land, the stable passed, and the license to enter was revoked, it was not incorporated in the deed to *Ransom*, and it was therefore, as to his bargainee, a nullity.

PER CURIAM.—JUDGMENT AFFIRMED.

CALVIN WASHBURN *v.* PETER O. PICOT *et al.*

In an action upon a promissory note, a total failure of consideration may be given in evidence to defeat it; but it is otherwise where there is only a partial failure, that can only be remedied by a distinct suit.

ASSUMPSIT, upon a promissory note, given by the defendants, upon an exchange of vessels.

Plea—General issue. On the trial at Washington, on the last circuit, before DONNELL, Judge, the defendants offered to prove, that the vessel which they re-

ceived from the plaintiff was not sea-worthy; and it was insisted for them, that this evidence should be received, to reduce the amount which the plaintiff claimed. But his Honor refused to receive the evidence, observing, that where there was a total failure of consideration, the evidence was proper; but where the failure was partial, it was the ground of a cross action.

Verdict for the plaintiff, and appeal by defendants.

No counsel appeared for the defendants.

Iredell, for the plaintiff, cited *Day* v. *Nix*. (17 *Eng. C L. Rep.* 121.) *Morgan* v. *Richardson*. (1 *Camp.* 40, *n.*) 2 *Starkie Ev.* 281.

DANIEL, Judge.—The law authorises the defendant, in an action on a promissory note, or on a bill of exchange, where the suit is between the original parties, to give in evidence a total failure of the consideration, as a defence. (*Greenleaf* v. *Cook*, 2 *Wheat.* 15.) But when the failure of consideration is partial, it is otherwise. The case of *Morgan* v. *Richardson*, (1 *Camp.* 40, *note*,) was an action brought against the acceptor of a bill of exchange, at the suit of the drawer, the bill being payable to his own order; defence, that the bill had been accepted for the price of some hams bought by the defendant from the plaintiff, to be sent to the East Indies, and that the hams had turned out so very bad, that they were not marketable. The sum for which they actually sold, was paid into court. Lord *Ellenborough* held, that although an entire failure of the consideration of the bill, would be a defence to an action upon it by the original party, yet it was otherwise where the failure was partial, and that then the drawer must take his remedy by an action against the person to whom it was given. *Tyre* v. *Gwyne*. (2 *Camp.* 346.) was an action by the drawer and payee of a bill of exchange againt the acceptor; the defendant proposed to prove in mitigation of damages, that the bill had been accepted for the price of a quantity of cheese, sold by the plaintiff to the defendant for exportation; that the cheese was of a bad quality, and improperly packed, and that

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the consideration for the acceptance had in a great measure failed. Lord *Ellenborough* said, "sitting here, I shall certainly adhere to the judgment of the court in *Morgan* v. *Richardson*. There is a difference between want of consideration, and failure of consideration. The former may be given in evidence to reduce the damages or defeat the plaintiff's action; the latter cannot, but furnishes a distinct and independent cause of action.—There is a distinction between the *contract* and the *security*. If part of the contract arises on a good consideration, and part on a bad one, it is divisible. But it is otherwise as to the security, that being entire." We think the judgment should be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

LUKE HUGGINS v. BRICE FONVILLE.

A sheriff who is special bail, may under the act of 1777, (*Rev.* c. 115,) surrender the principal to himself, and if after the surrender he detains the principal and notifies the plaintiff thereof, his liability as bail ceases.

SCIRE FACIAS, against the defendant, the sheriff of Onslow, as special bail of one *James Eslick*, who had been arrested and suffered by the defendant to go at large, without giving bail.

The only question in the cause arose upon a plea *puis darrein continuance*, filed by the defendant, the substance of which was, that *Eslick* had surrendered himself in exoneration of the defendant as his bail, and had been committed to the public jail, where he remained until discharged under the insolvent debtors' act, of all of which, the plaintiff had notice.

On the trial, before MARTIN, Judge, on the last circuit, the plea was fully supported by the evidence, but it appeared, that at the time of the surrender and discharge of *Eslick*, the defendant was still sheriff of Onslow.

The presiding judge informed the jury, that if they believed the defendant elected to hold *Eslick* in custody

as sheriff after the arrest, and had notified the plaintiff thereof, that it was in law, a bar to the action.

A verdict was returned for the defendant, and the plaintiff appealed.

J. H. Bryan, for the plaintiff.

No counsel appeared for the defendant.

DANIEL, Judge, after stating the plea and evidence as above, proceeded: It is evident, that our legislature intended to allow to bail greater privileges than were afforded by the common law. By the act of 1777, (*Rev. c.* 115, *s.* 20,) a surrender made at any time before final judgment against the bail, discharges them. The same act allows a surrender to be made either in court, or to the sheriff, in the recess of the court; and when the bail pleads a surrender, he should set forth whether the surrender was in court, or to the sheriff, that the plaintiff may know how to reply; for if it be alleged that the surrender was in court, the replication is *nul tiel record*; if out of court, the fact is denied, and an issue to the jury tendered. The defendant, as bail in this case, surrendered his principal to himself as sheriff, and in the latter character, committed him to the common jail of the county. He gave express notice of all these facts to the plaintiff. The defendant had the same privileges as any other person, who should happen to be bail. He had a right as bail, to surrender his principal to himself as sheriff, in the recess of the court, and notify the plaintiff. The law, in permitting the sheriff to be special bail, did not intend to deprive him of any of the rights which are allowed to other bail. Woful would be the situation of sheriffs in this state, if the law was otherwise; for it is a well known fact, that they are the special bail of a large number of the defendants arrested on writs of *capias ad respondendum*. After the defendant had confined his principal in his jail, if an escape had taken place, we can see nothing to prevent the plaintiff from maintaining an action for that escape against the defendant as sheriff. The principle of law, that one who is bail, may surrender to himself as sheriff, is not

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If a sheriff, who is bail, surrender the principal to himself as sheriff and afterwards there is an escape, the remedy is by debt or case.

controverted in any of the cases on the subject. It appears to be recognised in *Davidson* v. *Mull*, (1 *Hay*. 364,) and *Tuton* v. *Sheriff of Wake*. (1 *Hay*. 486.)

If the surrender was properly made, and from the finding of the jury under the correct charge of the court, we think it was, then if the prisoner was discharged illegally, the remedy cannot be by *sci fa*; but must be by an action of debt, or on the case against the defendant as sheriff, for an escape. Therefore, it is unnecessary to consider whether *Estick* was discharged legally or not, as the plaintiff cannot recover, if the discharge was improper.

PER CURIAM.—JUDGMENT AFFIRMED.

DEN *ex dem.* THOS. SOUTHERLAND *et ux* v. JOHN COX.

A devise to two, but if "either of them die, leaving no issue, that the whole should go to the survivor," is a good executory devise—and the devisees take as tenants in common in fee, with a contingent limitation to each of them, of an estate in severalty.

EJECTMENT, tried at Washington, on the last Spring Circuit, before SWAIN, Judge.

On the trial, the lessors of the plaintiff claimed under the will of *Miles Hardy*, which was in the following words: "I give and bequeath to my son *Henry*, and my daughter *Harriet Lee Hardy*, all the lands I may be possessed of at my death. It is however, my will and intention, that if either of my children aforesaid, at their death, should leave no issue lawfully begotten, that the whole of my estate, both real and personal, should descend to the survivor, and if they should both die, without," &c. They then proved, that the testator died in 1816, and that in 1819, under an order of the County Court of Washington, a partition of the land in dispute, which passed under the will, was made between the devisees, by which, 199 acres were allotted to each of them, and that *Henry Hardy* died in 1830, without

issue, and claimed the title to be in the female lessor of the plaintiff, who, before her marriage, was *Harriet L. Hardy*. The defendant insisted, that under the will of *Miles Hardy*, his son *Henry*, took an estate in fee; he objected to the partition as being informal, but for reasons which need not be stated. He claimed title to part of the land in dispute, against both the devisees, under an execution issued at the instance of the officers of Washington County Court, whereby the sheriff was commanded to sell the estate of both in the land. But from the return of the sheriff, it appeared, that the estate of *Henry* only was sold; and by his deed to the purchaser, nothing but *Henry's* title was conveyed — The defendant claimed the residue of the land under execution sales of *Henry Hardy's* property, and proved that he took possession of the land in dispute after those sales, and had continued it for more than seven years. Lastly, it was objected by the defendant, that notice to quit had not been given him before the writ was sued out.

His Honor instructed the jury, that the will of *Miles Hardy* was a valid limitation by way of executory devise to *Harriet Hardy;* that upon the death of her brother, without issue, she became entitled to the land in dispute; that if before the death of *Henry*, the interest of *Harriet* was subject to be sold under an execution against her, (which his Honor did not decide,) that neither the levy of the sheriff as set forth in his return, nor his deed to the defendant, would affect her title; that the possession of the defendant was not adverse to the title of the lessors of the plaintiff, until *Henry's* death in 1830, and that her right of entry was in no manner impaired by it: and finally that no relation existed between the lessors of the plaintiff and the defendant, whereby the latter was entitled to notice to quit.

A verdict was returned for the plaintiff, and the defendant appealed.

Gaston, for the defendant.

Badger, contra.

DANIEL, Judge, after stating the case, proceeded: The first question for us to decide is, whether *Harriet*

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Lee Hardy, who married *Southerland*, took the land in question, under the will of her father, *Miles Hardy*, by way of executory devise. Executory devises have generally been distinguished into three kinds; two relative to real, and one to personal estate. An instance of the first kind, is one where the devisor gives the fee, but upon some contingency, that disposition is qualified, and an estate limited on that contingency: as where a testator devised to B, his son in fee, but if he died without issue living A, then to A in fee: It was held, that B took a vested fee-simple, and that the limitation over to A was good as an executory devise, to take effect upon B's dying without issue in the life time of A. (*Pells* v. *Brown*, *Cro. J.* 590. 1 *Eq. ca. Ab.* 187.) Again; where a testator devised lands to his son B in fee, and other lands to his son C in fee, with a proviso, that if either of them should die before they should be married, or before they should attain the age of 21 years, or without issue of their bodies, then he gave all the lands which he had given to such of his sons, so dying, &c. unto the one who should survive: it was held, that the sons took in fee, subject to a limitation to the survivor, in case either died unmarried, or under the age of 21 years, without issue. (*Hanbury* v. *Cockerell*, *Fearne* 396.) According to these authorities, it appears to me, that *Henry Hardy* was a tenant in common in fee of the lands in question, with a contingent limitation to his sister *Harriet*, and she held the same estate with a contingent limitation to her brother *Henry*. The testator, by his will, says, "if either of my children aforesaid, at their death, should leave no issue lawfully begotten, that the whole of my estate, both real and personal, should descend to the survivor." Here the event must necessarily happen, if ever, within a life in being, and immediately on the death of a person in being at the time of making the will, and the survivor is entitled to take, by way of an executory devise, the whole estate in the land. The event on which the contingent limitation was limited, must necessarily take place within the period fixed by law for executory devises to vest; the event has taken place.

An executory devise in land is not destroyed by a sale under an execution against the first devisee.

Henry has died, leaving no issue lawfully begotten "at his death," and *Harriet*, as survivor, on that event had a vested estate in fee simple in the whole of the land. As *Henry*, by the will of his father, had a base fee in the land, on which estate there was created by the will, an executory devise to his sister, no conveyance which he could have made in his life time would have destroyed that executory devise, so neither will it be affected by an execution sale, and a deed from the sheriff to the purchaser. It is a rule, that an executory devise cannot be prevented or destroyed by any alteration whatever in the estate out of which, or after which it is limited. (*Romilly* v. *James*, 1 *Eng. C. L. R.* 379.)

The second objection made by the defendant, is altogether immaterial in this case. *Harriet*, on the death of her brother without issue, was entitled to the whole land, and whether partition was or was not made, does not affect the case. If a regular and legal partition had been made, and the defendant had purchased *Henry's* share, then *Harriet's* right of entry into that part would not have accrued until the death of *Henry*, which was in the year 1830. If no partition was made, then the defendant, after his purchase, was tenant in common with *Harriet*, and his possession was the possession of both. The third objection has no force in it; the sale under the execution, at the instance of the officers of the court, against *Henry* and *Harriet Hardy*, being of the estate of *Henry* alone, as appears by the return of the sheriff, and the recitals in his deed to the purchaser. *Harriet's* estate in the undivided moiety of the lands which had belonged to *Henry*, never vested until the year 1830, her right of entry as to that part, did not arise before that time, and she is entitled at least to recover that moiety. But did the sheriff's deed pass her undivided moiety? I think the estate which *Henry Hardy* had, passed by the sheriff's deed, and that the deed conveyed nothing in *Harriet's* share, nor is it colour of title as against her.

A sale of the estate of one tenant in common under an execution against all, does not divest the estate of the others.

The fourth objection is without weight, as the defendant, (provided the sheriff's deed did not convey the

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moiety belonging to *Harriet*,) was tenant in common with *Harriet*, and a possession of one tenant in common is in contemplation of law, the possession of all the tenants in common, and is so considered until something shall evince an actual ouster, and nothing of that kind appears in this case; a bare perception of the profits for so short a space of time as the defendant has had the possession, is not sufficient evidence of an actual ouster. *Henry* died in the year 1830, his interest under the executory devise, did not vest in his sister until that time, and this action was brought in a short time thereafter; the entry of *Harriet* is not barred by the act of limitations. The fifth objection will not avail the defendant. There was not any such relation between the lessors of the plaintiff and defendant as required a notice to quit.

An executory devisee has no right of entry until the contingency happens upon which his estate vests.

PER CURIAM.—JUDGMENT AFFIRMED.

JAMES LUCAS v. PATSEY WASSON & JOHN HARDIN.

Joint tenants of a chattel have equal rights to its possession, and cannot maintain trover against each other unless the joint property is destroyed. But a disposition of a perishable article by one joint tenant, which prevents the other from recovering it, is equivalent to its destruction.

TROVER. Plea—*Not guilty*, and on the trial before SWAIN, Judge, at Rutherford, on the last circuit, the case was, that the plaintiff and the defendant *Wasson* were joint owners of a quantity of cotton; that the defendant *Hardin*, by the directions of the defendant *Wasson*, carried the cotton away and disposed of it in some place not known. His Honor instructed the jury, that if they were satisfied that the cotton was removed by the defendants, entirely beyond the reach and control of the plaintiff, so as to be wholly lost to him, it was such a destruction of the property as would entitle him to recover.

A verdict was returned for the plaintiff, and the defendants appealed.

No counsel appeared for either party.

DANIEL, Judge.—One tenant in common of a personal chattel has as much right to the possession of it as the other; therefore, one tenant in common cannot maintain trespass or trover against his co-tenant without showing that the co-tenant has destroyed the joint property. (*St. John* v. *Standring*, 2 *John. R.* 468.) It is not sufficient to shew, that the defendant took forcible possession of the chattel and carried it away, (*Heath* v. *Hubbard*, 4 *East.* 121,) or that he changed its form by applying it to the use it was intended for. (*Fennings* v. *Greenville*, 1 *Taunt.* 241.) In the present case, it was in evidence, that the defendant *Wasson*, did not retain the possession of the cotton, but caused it to be sent off by the other defendant to a place unknown to the plaintiff, so that as to him it is wholly lost, and from its perishable nature, must be destroyed as far as his interest in it is concerned. We think the charge of the judge was correct, and the judgment must be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

LOVET MERRITT *et ux.* v. WILLIAM WINDLEY.

An assent to a legacy by an executor, may be presumed from his holding the legacy for five years, claiming it as next of kin to the legatee, and selling it as his own.

DETINUE, for a slave, and upon the general issue pleaded, the cause was tried before MARTIN, Judge, at Beaufort, on the last Spring Circuit. The slave in dispute, was formerly the property of one *Dorcas Campbell*, and upon her marriage with one *John Chapman*, was, with the rest of her estate, conveyed to one *William Worley*, in trust for her sole and separate use, with a power to dispose thereof by any writing in

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the nature of a last will, attested in a prescribed manner. In the year 1822, *Mrs. Chapman* duly made an appointment, and thereby gave the slave in dispute, to the wife of the plaintiff; she appointed *Worley* executor of her will, who proved it. In 1827, *Worley* conveyed this slave to a trustee, to secure the payment of his own debts. On the trial, to prove an assent to the legacy by *Worley*, the plaintiff offered testimony that *Worley* had written to him, at his residence in Georgia, to come after the slave; on the other side, proof was made to repel this assent, and especially, that the letter was written after the conveyance by *Worley* to secure his creditors, and that he had, when he made that conveyance, declared that the slave was his, as the appointee, and all her family had been killed by the Indians, and that he was her next of kin. After the conveyance made by *Worley*, to secure his debts, he had sold the slave to the defendant, and he being released, swore that he never had assented to the legacy to the plaintiff's wife.

His Honor instructed the jury, that the legal title to a chattel bequeathed, was in the executor; that an assent to the legacy, was the transfer of that legal title to the legatee; that to constitute such assent, the executor must manifest an intent to part with his title in favor of the legatee; that this intent might be manifested by words or acts; that slight circumstances were, in some cases, sufficient for that purpose; that the executor saying, that the slave belonged to the legatee, and that he had written to him to that effect, would in law, be an assent, unless at the time of making those declarations, the slave had been sold to the defendant, who was then holding him adversely; that if the executor had sold the slave, no assent which he could give, would vest the title in the legatee; and as to the declarations of the executor, when about to convey the property as above stated, the judge stated it in the form of an interrogatory, and asked the jury whether that declaration manifested an intent to part with, or that he had parted with the legal title.

In submission to this opinion, the plaintiff suffered a nonsuit, and appealed.

Gaston, for the plaintiff.

J. H. Bryan, contra.

DANIEL, Judge, after stating the principal facts as above set forth, proceeded as follows:

Whether the executor had assented to the legacy, so as to enable the plaintiffs to maintain their action, was a question submitted to the jury. The judge correctly stated in his charge, that "the executor must manifest an intent to part with the legal title in favor of the legatee; this intent might be manifested either by words or acts; that slight circumstances were in some cases, sufficient for that purpose." But in commenting on the declarations of the executor, proved to have been made just before he executed the deed for the benefit of his creditors, the judge stated it to the jury in the form of a question, "did such a declaration manifest an intent to part with, or that he had parted with, the legal title?" Instead of charging in that manner, we think he should have told the jury, that the length of time which had elapsed from the probate of the will, to the period when the executor stated that he held the slaves as next of kin to the legatees, taken in connexion with the fact of his selling them, claiming to be the owner, was sufficient evidence if they believed it, to authorise them to find that an assent had been given by the executor.

There is another point, apparent in the case, which renders it improper to send the case back for a new trial, as the plaintiffs clearly have no right to recover in a court of law, if all the points made in it were determined in their favor. *Dorcas Chapman* had, by the settlement, only an equitable interest in the slave. The power only enabled her "by writing, in the nature of a will, or other writing duly attested," to make an appointee, to take that equitable interest which she herself had by virtue of the settlement. The legal estate remained in the trustee, until the sale made by him to the defendant. Whether the plaintiffs can recover the slave in a court of equity, is not for us now to determine.

An assent to a legacy of a slave by the executor of a will made by a *feme covert* under a power, does not vest the legal title in the legatee.

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Although the testatrix appointed an executor, and he had the will admitted to probate in the County Court, which by law he ought to have done, yet that did not displace the legal title in the slave, and place it in the executor. The legal title remained in the trustee: and as the testatrix had only the equitable estate, she by her will could not invest her executor with any other interest than she had herself. The assent of such an executor transfers no title. The circumstance of the testatrix making *Worsley*, who was the trustee in the settlement, also her executor, does not alter the case; he still held the slave as trustee, and as such, an assent would not pass him to the plaintiff; the law would not divest the trustee of the legal title, unless he had made an actual delivery, or had executed a bill of sale to the plaintiff, which was never done. A writing in the nature of a will by a *feme covert*, under a power, is not a proper will, for she cannot make a will by the rules of law, but in equity it is an appointment, and the appointee takes under the power, coupled with the writing. We think the plaintiffs in this case, have no title at law, and therefore, the judgment must be affirmed.

And this, altho' the trustee in the marriage articles be also the executor, unless he assent by deed, or by actual delivery.

PER CURIAM.—JUDGMENT AFFIRMED.

ANGUS MORRISON v. ALEXANDER MORRISON, *Adm'r.*

In debt upon simple contract, a replication of a new promise within three years, is no answer to a plea of the act of limitations.

DEBT, upon an unsealed engagement of the defendant's intestate, to convey to the plaintiff a tract of land. Plea—The act of 1814, (*Rev.* c. 879,) requiring actions of debt grounded upon any lending or contract without specialty, to be brought within three years next after the cause of action.

On the trial at Moore, on the last Spring Circuit, before NORWOOD, Judge, the plaintiff's action being barred

by the above recited act. he offered evidence of an acknowledgement of the debt by the intestate, within three years; and his Honor instructed the jury. that if they were satisfied that the intestate had acknowledged the debt within three years, the plaintiff's action was not barred.

A verdict was returned for the plaintiff, and the defendant appealed.

No counsel appeared for the defendant.

Mendenhall, for the plaintiff.

DANIEL, Judge, after stating the case, proceeded as follows:

What would be our opinion, if the evidence had amounted to an acknowledgement of a subsisting debt by the defendant's intestate, and the action had been brought on that acknowledgement, instead of the original contract, we are not called on to say. But it is sufficient in the present case, to say, that the action is not founded on any subsequent acknowledgement of indebtedness, or promise to pay, or to settle a debt by the defendant's intestate, but it is brought on the original contract. The action of debt being founded on the original contract, the plea of the act of limitations is a bar. The replication, that the defendant's intestate promised to pay the debt within three years next before the time of suing out the writ. is not good. In actions of assumpsit, where the plaintiff replies to a plea of the statute of limitations, a promise made by the defendant within three years next before suing out the writ, the action is now said to be on the new promise, and the recovery is effected on that, and not on the original promise; and the moral obligation resting on the defendant to pay the old debt, is the consideration to support the action on the new promise. However the law may be on this question, we give no opinion, namely, whether in assumpsit, the recovery is on the new promise, or whether the new promise removes the statute, and the recovery is had on the original promise. In the case of *A'Court* v. *Cross*, (11 *Eng. C. L. Rep.* 124,) *Best*, C. J. commenting on the

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statute 21 *Jas.* 1, observes, that the "statute says, that actions on the case, account, trespass, debt, detinue and replevin, shall be brought within six years after the cause of action, and not after. In all of them, except assumpsit, the six years commences from the moment there is a cause of action, and that time cannot be enlarged by any acknowledgment. But in assumpsit, it has been holden, that although six have elapsed since the debt was contracted, if the debtor promises to pay it within six years, he cannot avail himself of this statute —because this promise, founded on a moral consideration, is a new cause of action." The same learned judge then proceeds and remarks, that in assumpsit, the plaintiff should declare on the new promise, for the old one was barred by the statute. According to this authority, it is evident that the judge below was mistaken in informing the jury that a new promise or acknowledgement of the debt, would take this case out of the act of limitations; this action is not brought on the debt arising under the new promise; but it is brought on the original contract; and the action on that was barred by the act of limitations, at the time the writ was issued. We think the judgment must be reversed, and a new trial granted.

Per Curiam.—Judgment reversed.

Den *ex dem. of* Martha Jones v. Rebecca Ruffin.

Where A conveyed his estate to a trustee to secure B his surety, who agreed to purchase the estate at a sale by the trustee, and upon a re-sale, after indemnifying himself, to hold the surplus for C, another creditor of A: It was held, that a conveyance by B of the surplus to satisfy C was not voluntary, and fraudulent as to his creditors, altho' there was no written memorandum of the agreement between him and A.

Ejectment, tried before Norwood, Judge, at Halifax, on the last circuit.

The lessor of the plaintiff claimed under the following deed:

"This indenture, made, &c. between *James Grant* and "*Eli B. Whitaker*, witnesseth: that the said *J. G.* for "and in consideration of the sum of $12,000, to him in "hand, paid by the said *E. B. W.* the receipt, &c. hath "bargained and sold &c. unto the said *E. B. W.* his "heirs and assigns forever, all the land which I am "seised and possessed of (describing other lands not in "dispute); also, the following negro slaves, &c. to have "and to hold the said property to him the said "*E. B. W.* his heirs and assigns forever; and the said "*James Grant* doth, &c. (then followed a covenant for "quiet enjoyment); also, I further convey unto him the "said *E. B. W.* his heirs, &c. a certain tract of land "lying, &c. (describing the land in dispute,) which land "I purchased at the trust sale of *Thomas Bustin*, the "said land to go to satisfy in full, a certain power of at-"torney by me held, in favor of *Martha Jones*, and the "balance, if any, to be applied to another power of at-"torney in favor of *Fanning Jones*. The first named "property in trust for the following purposes;" then followed a declaration of trust in favor of sundry of *Grant's* creditors, and directions to the trustee as to the mode of selling, which are not material.

This deed was proved before his Honor Judge DANIEL, by one *William Bustin*, an attesting witness, and was registered within six months. The defendant objected to the reading of the deed, and offered to prove, that the witness upon whose testimony it was ordered to be registered, was a creditor who was secured by it, but his Honor held the probate to be sufficient, and the deed was read.

A registration of a deed of trust made upon proof of its execution by an attesting witness, who was interested under it, is valid.

The defendant then objected, that the legal title to the land in dispute, (that mentioned in the deed as bought of *Thomas Bustin*,) did not pass to the trustee, *Whitaker*, because no consideration was expressed in the deed upon which a use arose as to it. But his Honor thinking the consideration of $12,000 extended to all the land mentioned in the deed, overruled the objection. A verdict

A pecuniary consideration mentioned in the first part of a deed of bargain and sale, extends to any land conveyed in the deed to the person who paid that consideration.

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was then taken for the plaintiff, subject to the opinion of the court, upon the following case:

Thomas Bustin being largely indebted, applied to *Grant*, the bargainor in the above deed, to be his surety, who consented, upon condition that *Bustin* would convey all his property to a trustee for his security, which was accordingly done. At the time of making this conveyance, *Bustin* was the executor of his mother, and had wasted the assets, and *Martha* and *Fanning Jones*, two of the legatees, had given *Grant* powers of attorney to collect their legacies. *Bustin* being insolvent, a sale of his property was advertised for the purpose of indemnifying *Grant*. Before this sale, *Grant* knowing *Bustin* to be insolvent, agreed with him that he, *Grant*, should purchase all the property, and if, upon a re-sale of it, any thing remained after paying the debts for which *Grant* was surety, it should be applied to the payment of the debts due *Martha* and *Fanning Jones*. In pursuance of this agreement, *Grant* bought the whole of *Bustin's* property, and after fully indemnifying himself, the land in dispute remained in his hands unsold. Afterwards, *Grant* became insolvent, and executed the deed to *Whitaker*, for the purpose of securing his debts; at its date, he had collected nothing from *Bustin*, and was not indebted to either *Martha* or *Fanning Jones*, but conveyed the land in dispute for the purposes mentioned in the deed, in execution of his agreement with *Bustin*, by which he felt himself morally bound. The defendant claimed under an execution sale of *Grant's* property. If these facts made *Grant's* deed to *Whitaker* fraudulent, then the verdict was to be set aside, and a nonsuit entered—otherwise, judgment was to be rendered for the plaintiff. His Honor being of opinion for the plaintiff, judgment was entered upon the verdict, and the defendant appealed.

Gaston and *Devereux*, for the defendant.

Badger, *contra*.

Ruffin, Judge.—The principal question is, whether the deed from *Grant* is void against his creditors, as being

in reference to this tract of land, voluntary; for if it be gratuitous, it is of course fraudulent. The morality of the case is certainly with the plaintiff. and has been so admitted, for no imputation of actual fraud is made.

I think the deed may be supported upon the ground of a valuable consideration. *Bustin* had a resulting trust in the estates, after the satisfaction of *Grant's* claims, which was of value, as is proved by the proceeds of the ultimate sales being more than sufficient to satisfy those claims. *Grant* and he treat for that interest, and if the former had agreed then to pay *Bustin* a certain sum for it, the promise would have been obligatory, although it formed part of the agreement that *Grant* should take his title under a sale by the trustee, and upon that sale, the estates were bought at a sum less than *Grant's* demands. After such a contract, *Bustin* would have no interest to make him look out for purchasers, or to endeavor to raise the money himself, and it would be a complete fraud on him, did it not bind *Grant*. It is the same thing as agreeing to pay *Bustin* a price, for *Grant*, as the agent of another creditor, to agree that the value of the resulting interest, to be ascertained by a re-sale, should be applied in discharge of the debt of that creditor, whose agent he was. It seems to me, that the question is a plain one, when viewed in this light, and that it is only embarrassed by considering the conveyance to *Grant* by the trustee, as the only evidence of the contract of purchase. Whereas, that is only the mode of executing the contract and getting the title into *Grant*. It might create a difficulty in proving the real contract, if it were denied upon a bill founded on it; but if it were admitted by the defendant, I think a court of equity would certainly establish it as a sale of the resulting trust of *Bustin*; and upon a question of fraud, the objection to receiving parol evidence does not arise, when the party bound by the agreement has acted on it in good faith. I conceive that *Grant* in his own right, agreed to give the true value of the estates for them, though at the sale then to be had, he might bid them off for less; and as agent, he agreed to receive as payment to the *Jones'* the excess of the value above his own

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claims. It is like a purchase from a defendant in execution at a certain price, with a further agreement, that in order to complete the title, and make it good against other execution creditors, the sheriff's sale shall take place, and the purchaser buy at it.

Suppose in this case, that *Jones* sued *Bustin* on the original debt, is not the latter entitled to credit for the value of the estate conveyed to *Jones?* And if so much of *Jones'* debt be discharged by the conveyance, how is it voluntary? The case of *Williams* v. *Howard*, (3 *Mur.* 74,) is much like this, as between *Grant* and *Bustin*, and if *Grant* was bound to *Bustin*, it is the same, as a consideration for the deed, as if he was bound to *Jones;* though I think there was an obligation to both.

The conveyance of all the estates being to the same trustee, from whom the consideration mentioned in the beginning of the deed moved, that consideration extends to the whole, especially, when the words "*also I further convey*" connected with the grant of this tract, are taken in.

The objection to the probate has been abandoned in the argument, and therefore, upon the whole case, I think the judgment must be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

CYRUS STOWE & JOHN WHITTIER
v.
THE BANK OF CAPE FEAR.

In an action by the holders of a bill of exchange, against a bank for not giving the drawer notice of a non-payment by the acceptor, the fact of the drawer's insolvency, may be estimated by the jury, in assessing the amount of damages.

ASSUMPSIT, and upon the general issue pleaded, the case was as follows:

The plaintiffs had a bill of exchange drawn by a person resident in Wilmington, upon a house in Fayetteville, which they sent to the Branch Bank of Cape Fear at the

latter place. for collection. At the time the bill was due, the parties to it were insolvent, and the office at Fayetteville neglected to notify the drawer of its non-payment.

They plaintiffs insisted that they had a right to recover the amount of the bill; but his Honor, Judge NORWOOD, informed the jury, that in estimating the damages, of the plaintiffs, they ought to take into consideration the insolvency of the parties to it.

A verdict was returned for the plaintiffs with nominal damages, and they appealed.

Gaston, for the plaintiffs, cited *Smedes* v. *Bank of Utica*, (20 *John. R.* 372.) *Chitty on Bills, pages* 209 *to* 211 *&* 287.

Badger, contra.

DANIEL, Judge.—The plaintiffs left with the bank a bill of exchange, for collection when it should become due, and if it should not be paid at maturity, to notify the drawer thereof. This action is brought to recover damages for a breach of promise, in neglecting to demand payment, and giving notice of non-payment to the drawer; by means of which neglect, the latter was discharged from his liability. There is no doubt but that the bank is liable to the plaintiffs as any other agent or bailee would have been, but it is liable in no other way. The plaintiffs are entitled to recover such damages as they have sustained by the defendant's breach of promise. The amount of the bill of exchange, is not the criterion to govern the jury in assessing them. unless it appears that the plaintiffs had lost that amount of money. by the misconduct of the defendant. The evidence, that the drawer was insolvent. was proper to be left to the jury. If it was probable that the drawer would again become solvent, by any chances or means whatever. the plaintiffs should have offered such testimony to the jury for the purpose of enhancing the damages. I think the judge was correct in his charge, and the case was properly decided. The judgment below must be affirmed.

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Ruffin, Judge.—There being no special contract proved, it must be taken to be such an one as the law infers from the circumstances, which seems reasonably to be, to pay to the plaintiffs the loss arising from the failure of the defendant to perform any act agreed to be done. It is the ordinary case of an agency undertaken, and the actual damage is the measure common to this and other cases. Policy requires a different rule in certain cases of public employments, because of the opportunities on the one part for the concealment of the misfeasance, and the difficulty of obtaining proof of the actual fact, on the other. Hence arises the liability of carriers, and hence the statute gives debt against the sheriff for an escape. But those reasons do not extend to an undertaking of this sort. It may be more than ordinarily difficult for the jury to ascertain the loss, but that does not authorise the court arbitrarily to fix it in all cases at the greatest possible amount. And the difficulty here is not greater than in many other cases of like agencies; as, if an attorney neglect to sue an insolvent party to a note. It is not like the contract of an endorser or drawer of a bill; that is, to pay the debt if notice be given; if no notice, he pays nothing. But I believe this has not been applied beyond the parties; and as to them, it is founded on the special agreement. No precedent of such an action, has been cited or found by the court, and we cannot make one without altering what has been generally considered the established law of principal and agent. If the bank be liable at all, we think the Superior Court adopted the proper rule for assessing the damages, and the judgment is affirmed.

Per Curiam.—Judgment affirmed.

Livingston Isbell v. Salathiel Stone.

Where judgment is rendered in the court below upon a case agreed, which is defectively stated, it will be reversed upon appeal.

This was an action on the case against the defendant, as sheriff of Stokes, for making a false return to an exe-

cution which issued at the instance of the plaintiff. against one W. H. S. The record certified to this court, contained no entry of any pleas by the defendant.

On the Fall Circuit of 1831, a case agreed was submitted to DANIEL, Judge, who gave judgment for the defendant, and the plaintiff appealed. It is not thought to be necessary to state the facts set forth in the case.

No counsel appeared for either party.

DANIEL, Judge.—The case agreed by the parties, is so imperfectly made up, that we deem it improper to give an opinion upon the points made in it. If we should come to the conclusion, that the plaintiff was entitled to a judgment, the case states no sum for which it should be entered. We cannot say, that the slave concerning whom it is alleged the defendant made a false return, is worth the sum claimed by the plaintiff. There is no verdict of the jury—no sum of money agreed by the parties that the judgment should be entered up for, in case the plaintiff should be entitled to recover. The case is imperfect in another respect; it states that *Stults* and *Hauser* contracted with *Wm. H. Sheppard*, for the slave in the county of Surry, but does not state whether the contract was then executed, by a delivery of the slave, or whether there was a bill of sale given in Surry, or whether the contract was barely executory. For these defects, we think the judgment should be reversed, and the case remanded.

PER CURIAM.—JUDGMENT REVERSED.

DEN *ex dem.* THIRZA HATCH *v.* HENRY W. THOMPSON,

A deed to the children of A, reserving to him the use and benefit of the land, vests in him as estate for life.

This was an EJECTMENT, on the several demises of five persons as tenants in common, tried on the last circuit, before STRANGE, Judge, at Onslow.

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HAVEN v. THOMPSON.

It did not appear how all the lessors of the plaintiff claimed title, but the plaintiff declared for one hundred and thirty acres of land, part of a tract of six hundred and forty acres of which one *Abner Battle* and three others, had been tenants in common. The plaintiff attempted to prove a partition between *Battle* and his co-tenants, but failed. *Battle* devised his land to his wife for life, with a remainder to his daughter *Susannah*, who married one *Lot Humphreys*. *Humphreys* and wife, in the year 1808, executed the following deed to their daughter *Thirza*, one of the lessors of the plaintiff:

"To all people, &c. know ye, that we, *Lot Humphreys* "and *Susannah* his wife, for and in consideration of the "love, good will and affection which we have and do bear "towards our loving daughter *Thirza*, have given and "granted to the heirs of her body, on the terms herein- "after particularly described, a certain tract of land, "which &c. (setting out the above devises and descents "and the boundaries of the land); and by these presents "do give and grant freely, the above described and de- "scended land, containing one hundred and thirty acres, "to the said *Thirza's* body heirs; reserving particulary, "the use and benefit of said gifted land, to said *Thirza*, "discretionary in herself, whether or not, during her "natural life; but should said *Thirza Humphreys* die, "without leaving living heirs of her body, then the above "gifted land shall return to her whole blooded brothers "and sisters."

The defendant objected, that *Thirza Humphreys* took nothing under this deed; but if she did, then he objected that as she had not declared as a tenant in common, with the other co-tenants of *Abner Battle*, and as the deed covered land held by him in common with others, she only acquired by the deed a right to *Abner's* undivided interest in the land described in the declaration, and could not therefore execute a lease which would enable her lessor to maintain this action. His Honor however, thought that the deed from *Humphreys* and wife to *Thirza*, took effect as a covenant, to stand seised for her use either for life, or in fee; and that it enabled her to make a lease of the

one hundred and thirty acres, which would be good against all the world but her co-tenants.

A verdict was returned for the plaintiff, and the defendant appealed.

J. H. Bryan, for the defendant.

Gaston, contra.

Daniel, Judge.—Whether the deed accompanying the case, is good as a covenant to stand seised, is the first question to be determined. Uses may be raised upon what is called a good consideration, which is that of blood or marriage. Conveyances raising uses upon a good consideration, are termed covenants to stand seised. The consideration of blood, causes the operation of the conveyance. The words *covenant to stand seised*, are therefore, not essential to its validity. A conveyance in the form of, but void as a grant, feoffment, or release, may still take effect as a covenant to stand seised. If the consideration appear, though it be not particularly expressed, yet it is sufficient to raise a use Therefore, if a man covenant to stand seised to the use of his wife, son, or cousin, without saying in consideration of the natural love which he bears towards them, the covenant will raise the use. (*Milboun* v. *Simpson*, 2 *Wils.* 22. *Bedell's case*, 7 *Co.* 40. 2 *Saun.* 80, 81.) A *feme covert*, can stand seised to a use. (1 *Saun.* 56.) In the case before us, *Humphreys* and wife in the deed, express the consideration to be, for the love and good will which they had for their daughter, *Thirza Hatch*. This consideration raised a use to her at least for life, by that part of the conveyance which follows, "reserving particularly the use and benefit of said gifted lands, to the said *Thirza*, discretionary in herself, whether or not, during her natural life: but should said *Thirza* die, without leaving living heirs of her body, then the above lands to return," &c. The statute of uses executed the possession to the use, and the legal estate is as extensive as the use. It is unnecessary at present, to determine whether the conveyance would be a good covenant to stand seised to the use of *Thirza*

A consideration of blood appearing upon a deed, inoperative as a bargain and sale, will make it enure as a covenant to stand seized.

Dec. 1832.

HAYES v. THOMPSON.

It did not appear how all the lessors of the plaintiff claimed title, but the plaintiff declared for one hundred and thirty acres of land, part of a tract of six hundred and forty acres of which one *Abner Battle* and three others, had been tenants in common. The plaintiff attempted to prove a partition between *Battle* and his co-tenants, but failed. *Battle* devised his land to his wife for life, with a remainder to his daughter *Susannah*, who married one *Lot Humphreys*. *Humphreys* and wife, in the year 1808, executed the following deed to their daughter *Thirza*, one of the lessors of the plaintiff:

"To all people, &c. know ye, that we, *Lot Humphreys* "and *Susannah* his wife, for and in consideration of the "love, good will and affection which we have and do bear "towards our loving daughter *Thirza*, have given and "granted to the heirs of her body, on the terms herein- "after particularly described, a certain tract of land, "which &c. (setting out the above devises and descents "and the boundaries of the land); and by these presents "do give and grant freely, the above described and de- "scended land, containing one hundred and thirty acres, "to the said *Thirza's* body heirs; reserving particulary, "the use and benefit of said gifted land, to said *Thirza*, "discretionary in herself, whether or not, during her "natural life; but should said *Thirza Humphreys* die, "without leaving living heirs of her body, then the above "gifted land shall return to her whole blooded brothers "and sisters."

The defendant objected, that *Thirza Humphreys* took nothing under this deed; but if she did, then he objected that as she had not declared as a tenant in common, with the other co-tenants of *Abner Battle*, and as the deed covered land held by him in common with others, she only acquired by the deed a right to *Abner's* undivided interest in the land described in the declaration, and could not therefore execute a lease which would enable her lessor to maintain this action. His Honor however, thought that the deed from *Humphreys* and wife to *Thirza*, took effect as a covenant, to stand seised for her use either for life, or in fee; and that it enabled her to make a lease of the

one hundred and thirty acres, which would be good against all the world but her co-tenants.

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A consideration of blood appearing upon a deed, inoperative as a bargain and sale, will make it enure as a covenant to stand seized.

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in *fee tail*, which by the act of 1784, (*Rev. c.* 204,) would be converted into a fee-simple. As to the second question, we have always understood, that one tenant in common may bring an ejectment, declaring upon a several devise of the whole tract of land, and recover possession of such an undivided portion of it, as he proved title to on the trial. Whether the lessor of the plaintiff had been seven years in the adverse possession of the one hundred and thirty acres, under the deed from *Humphreys* and wife, so as to ripen her possession into a good title to the whole tract of land, does not appear: but from what does appear in the case, she is entitled to recover the undivided one-fourth part of the one hundred and thirty acres of land mentioned in the declaration, and for that portion, the judgment below is affirmed.

One tenant in common may declare for all the joint estate, and recover his proportion.

PER CURIAM.—JUDGMENT AFFIRMED.

DEN *ex dem.* WILLIAM G. MHOON *v.* JOHN DRIZZLE.

Where the owner of land agreed that A should cultivate it during his life, or as long as he pleased, with a restriction as to a sale of it: Held by HENDERSON, C. J. and DANIEL, J. that a tenancy at will was created, and that the estate might be determined by either party; by RUFFIN, J. that no estate vested in A.

EJECTMENT, tried on the Fall Circuit of 1831, before MARTIN, Judge, at Bertie.

The plaintiff claimed under a judgment and execution against the heirs of one *William Maer*, and having made out his case, the defendant produced and proved the following deed:

"Articles of agreement entered into between *William Maer* and "*John Drizzle*, both of, &c. witnesseth: that the said *William Maer* "does agree on his part, to let the said *Drizzle* tend, use and occupy, "a certain field in the low grounds, (then followed a description of the "land,) being the field he, the said *Drizzle*, has now in possession, "during his natural life, or so long as the said *Drizzle* may wish to "tend it himself, and no longer. In consideration of which, the said "*John Drizzle* does agree on his part, to clear and get under cultivation "as much of said land, between, &c. (describing the land to be cleared)

"as he conveniently can, and it is understood by both parties, that if "the said *Drizzle* should at any time hereafter, decline tending said land "himself, that he shall have no right to rent, lease, or in any manner "whatever, put it in the possession of any other person, but at the "time of so declining to use it himself, it shall return to him the said "*Maer*, or in case of his death, to his estate.

"In witness whereof, we have hereunto set our hands and seals this "20th day of December, A. D. 1813.

W MAER, [L. S.]
JOHN DRIZZLE, [L. S.]

Witness,
HENRY BATES,
A. COPELAND."

At the time the defendant took possession, a small field of about ten acres was cleared; since that time, he had cleared about sixty acres, and had continued the possession from the date of the above instrument, up to the trial.

His Honor instructed the jury, that the obligation produced by the defendant was, upon its face, voluntary; that a valuable consideration purported either a present or future advantage to the grantor, or a present or future loss to the grantee; that the instrument under which the defendant claimed, purported neither; that the stipulation that the defendant should clear land, "*if convenient*," imposed no obligation upon him, but left it simply as a matter of choice, whether he should or should not clear more land.

The jury returned a verdict for the plaintiff, and the defendant appealed.

Badger, for the defendant.

Gaston, *Iredell* and *Hogg*, *contra*.

DANIEL, Judge.—The defendant contends, that he has a life estate by virtue of the deed executed by *Maer* to him. If the deed can be considered as a feoffment at common law, and the defendant entered under it, yet if there was no livery of seisin made to him, he would only be tenant at will. (*Lit.* s. 70. 1 *Thomas' Coke* 637.) If the declaration on the face of the deed, that the defendant was then in possession, coupled with the fact, that the deed is subscribed by witnesses, would authorise an inference, (which I think it does not,)

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Macer v. Driesen.

that livery of seisin had been made, yet as the conveyance is without any consideration or any use declared, a use would be raised to the feoffor, since the statute of *quia emptores*, (1 *Saun.* 62.) and the possession would be executed to the use, by the statute of uses. *Macer* would in that event, have the freehold estate, and the defendant be his tenant at will. Again, if the deed is viewed as a lease, it must be considered as a lease at will, "it is regularly true," says Lord *Coke*, "that every lease at will, must in law, be at the will of both parties, and therefore, when the lease is made, to have and to hold at the will of the lessor, the lease implieth it to be at the will of the lessee also; for it cannot be only at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, that must be at the will of the lessor." (1 *Thomas' Coke* 637.) The defendant had a right to put an end to his tenancy whenever he pleased, and *Macer* had the same right.

If the defendant was tenant at will of the land by a parol lease, before the date of the deed, as no consideration was paid, or intended to be paid, and no use declared, the deed operating as a release, cannot enlarge the estate, so as to give a life estate to the defendant; a release for life on such an interest, would, since the statute *quia emptores*, only raise a use to *Macer* in the same manner as would a feofment without consideration, (*Loyd* v. *Spillet*, 2 *Atk.* 148, 2 *Doug.* 745, *note*,) which use would in like manner have the possession drawn to it by the statute of uses. So in whatever light the case is viewed, the defendant could hold only as tenant at will. The death of *Macer* put an end to the tenancy at will, and the land was subject to be sold for his debts, and as the deed would not have operated as an estoppel to *Macer* in his life time, neither will it so operate against the lessor of the plaintiff. If the instrument is to be considered as a personal covenant, of course it would be no defence to the action. I think the judgment should be affirmed.

Henderson, Chief-Justice.—An estate at will is an estate at the will of either party, and if at the will of one,

it must be at the will of both. There can be no such estate as one at the will of one party only. In this case, the fact that *Drizzle* was authorised to put an end to his tenancy whenever he pleased, conferred the same right on *Maer*, and *Mear's* will was determined when his estate was sold, for he had no longer a will on the subject. It appears to be a hard case, but it was the defendant's folly or misfortune to make such a contract. I am instructed by Judge RUFFIN to say, that he concurs in the opinion principally because he thinks the writing a mere personal contract, not attaching to the land, or passing, or intended to pass an estate in it, but resting entirely in contract.

PER CURIAM.—JUDGMENT AFFIRMED.

RICHARD HARRISON, *Chairman, &c. on the relation of* BARNES & ENOS AMASON,

v.

LAMON WARD & JONATHAN ELLIS.

Where the same person is administrator, and also guardian of the next of kin, his returning an account of his administration, and acknowledging a balance due his ward, is not a performance of the condition of his administration bond. But it is otherwise if the money to pay the balance, is identified, and retained by the guardian, as the property of the ward.

In such a case are the bonds cumulative. Qu?

DEBT, upon a bond executed by the defendants, as sureties of *Elisha Amason*, on his taking out letters of administration upon the estate of *Woodward Amason*.

After *oyer*, the defendants pleaded several pleas, and amongst them, performance of the condition of the bond, by the administrator.

On the trial, before SWAIN, Judge, at Edgecomb, on the Fall Circuit of 1831, the defendants relied upon the following facts in support of their plea:

At November sessions 1821, of the County Court of Edgecomb, *Elisha Amason* was appointed guardian of the relators, and of their brother *Woodward*, the intestate,

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and gave the usual bond, with sufficient sureties. The intestate, *Woodward*, died in 1825, and at February sessions 1826, letters of administration upon his estate, issued to *Elisha Amason*, who then gave the bond upon which the action was brought. At November sessions 1828, *Elisha Amason* returned an account current as administrator of *Woodward*, which showed a balance due the relators, who were his next of kin, and which was claimed in this action. At February sessions 1828, *Elisha Amason* renewed his bonds as guardian of the relators, and gave sureties who were then, and at the time of the trial, insolvent.

Upon these facts, his Honor ruled, that the guardian and administration bonds were cumulative securities for the benefit of the relators, and that they had a right to elect on which of them to sue; and that if the bonds were not cumulative securities for the relators, they had, upon the facts in evidence, a right to recover upon the administration bond.

Verdict for the plaintiff, and appeal by the defendants.

The *Attorney General* for the defendants.

Hogg and *Mordecai*, *contra*.

HENDERSON, Chief-Justice, after stating the case as above, proceeded: The bond is in the proper and usual form of an administration bond. The defendants rely on the fact, that the conditions of the bond were performed by the administrator's rendering an account current as above stated, he being then also the guardian of the relators; that is, that the money acknowledged to be due to the relators in that account, by its rendition, *ipso facto*, passed from the possession of *Elisha* as the administrator of *Woodward*, and vested in him as the guardian of the relators. Had this been specific property, and in the actual possession of *Elisha*, his possession more than two years after his appointment as administrator, would unquestionably, according to the case of *Clancy* v. *Dickey*, (2 *Hawks* 497,) have been as guardian, and would so far, have been a performance of one of the conditions of his administration

The case of *Clancy* v *Dickey* (1 *Hawks* 497) approved.

bond, viz: a payment or delivery to the persons entitled. I presume the rule to be a sound one, that when a person has two or more capacities in which to take and hold, and takes and holds, without a declaration in which capacity he does so, it shall be taken that he holds in that capacity in which he ought of right to take and hold. He takes in the one capacity or the other, not in both; it is therefore reasonable that he should hold in the rightful capacity, and so in the absence of proof to the contrary, the law presumes. But this rule cannot apply to money not identified or separated from other money, by putting a mark upon it, as in the case before us, where it was not made the ward's money; until this is done, the condition of the bond is not performed. In this case, it remains a mere debt or duty, owing to the relators, and that it should be paid to them, or some person for them, was the object of taking the bond now in suit. Whether the admission upon the record, made by the administrator, amounts to enough to charge the sureties to the guardian bond, it is unnecessary to decide. If they are charged, it will not be by proof of any fact, but by the admission of one, who is charged upon that admission by an estoppel, without regard to the actual state of the facts. As for instance, they would be charged in the present case, without proof that the guardian had so much money of the estate of the intestate in his hands. On no other state of facts, either actual or by estoppel, can the sureties of the guardian be charged. The estoppels of *Elisha Amason* do not affect the relators, they may insist on new rights arising on the *actual facts*, not on those which others are concluded from denying. It will be understood that I give no opinion whether the guardian bond is, or is not cumulative.

Where an act is rightful in one capacity, and wrongful in another, without proof to the contrary, it is taken to be in the first.

PER CURIAM.—JUDGMENT AFFIRMED.

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Richard Yarborough v. Stephen Monday.

Two parties may adopt the same seal, and in that event, it is the deed of both, otherwise, it is the deed of one and the simple contract of the other. But the question whether both parties adopted the seal, is one for the jury, not for the judge.

After the new trial granted in this cause, at December term 1830, (*ante* 2 *vol. page* 493,) it came on to be tried again at Person, on the last Spring Circuit, before Strange, Judge, when the action was in assumpsit, and upon the objection of the defendant, that the contract of apprenticeship was under seal, and that debt was the proper action, the testimony was, that the brother of the plaintiff wrote the contract, and at the bottom of it made a scrawl, and wrote the word *seal* within it; that immediately afterwards, by the directions of both the parties, he signed their names to the contract, putting the name of the plaintiff opposite to the scrawl, but he did not make another scrawl, nor add any thing purporting to be a seal, opposite to that of the defendant.

Upon this testimony, his Honor ruled the contract to be the deed of the defendant, and thereupon the plaintiff submitted to a nonsuit and appealed.

Winston and *W. A. Graham*, for the plaintiff.

No counsel appeared for the defendant.

Daniel, Judge.—The law permits two or more obligors to adopt one seal, and it will be the deed of both of them. (*Ball* v. *Dunsterville*, 4 *Term* 313. 1 *Starkie* 332. 2 *Thomas' Coke* 234.) If the plaintiff sealed the instrument and delivered it, then it became his deed, but if the defendant signed the same instrument and did not seal it himself, nor adopt the seal of the plaintiff, then the instrument as to him, would not be a deed, but a simple contract in writing, and assumpsit would be the proper action to be brought on it. Evidence was introduced as to that point, and it was a proper question for the jury, whether the defendant intended to adopt the seal thus affixed, and did adopt it as his seal or not; if he did, then it was his deed; if he did not, then it was

his simple contract, and the action was properly brought. The judge decided both the law and the fact; he should have left it to the jury to determine whether the defendant intended to adopt the seal and did adopt it, for these were questions of fact. Whether the scrawl affixed was in this state a seal, certainly was a question of law to be determined by the Court; but whether the defendant placed it there, or adopted it as his seal, if placed there by the plaintiff, or any other person, were questions for the jury. We think the judgment should be reversed.

Per Curiam.—Judgment reversed.

Theophilus Falls *et al Ex'r. of* Robert Simonton

v.

James McKnight.

Where A owed B, and made him a payment taking his acknowledgment with a promise to refund, in case the payment exceeded the amount due, and upon a reference, the arbitrator found that B was overpaid: it was held, in an action upon the acknowledgment, that the statute of limitations did not begin to run until the award was made. Is a submission to arbitration a waiver of the statute of limitations. Qu?

Assumpsit, upon the following accountable receipt:

"Received of *Robert Simonton*, executor of *James Heart*, $953 24 "which I have received as an heir of *James Heart*, and if it is too much, "I am to return the balance.

JAMES McKNIGHT."

Plea—The statute of limitations.

On the trial, before Daniel, Judge, at Iredell, on the Fall Circuit of 1831, the defendant having made out a *prima facie* case, in support of his plea; the plaintiffs to rebut the defence, proved, that a petition was pending in the County Court of Iredell against *Simonton*, by the next of kin of *James Heart*: that in the year 1828, it was agreed between the plaintiffs and the next of kin, of whom the defendant was one, that the suit by petition should be referred to an arbitrator, "with power and authority to

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"allow the said executors, (the plaintiffs) such credits "for all receipts in their hands, which, in his opinion, "they would be allowed by law or equity;" that in pursuance of this submission, the arbitrator by his award, found that the defendant had been overpaid the sum of $905. Judgment was entered according to the award, which was made made within three years of the commencement of the action.

His Honor instructed the jury, that the submission and award prevented the defendant from availing himself of the statute of limitations, and a verdict being returned for the plaintiffs, the defendant appealed.

Badger, for the Defendant.

Gaston, contra.

HENDERSON, Chief-Justice.—The receipt given by the defendant to *Simonton*, contains a promise to account with him, if the sum received by the defendant exceeded that due by *Simonton*. We will leave out of the question what would be the effect of a long delay on the part of *Simonton*, and his then by his own motion without the co-operation of the defendant, fixing the amount of these claims, and demanding the balance according to the terms of the receipt. I say it is unnecessary to examine such a case with respect to the statute of limitations, for this is a very different one. So far from the adjustment of those claims, and the proof of the fact that they fall short of the defendant's accountable receipt, being the sole act of *Simonton* or his executors, they were forced on his executors by the active agency of the defendant, who was a plaintiff in the petition for an adjustment of the accounts, and brings to view by his act, the fact which shews conclusively the amount of his claim on *Heart's* estate, viz: by an award of an arbitrator of his own choosing, according to which, a judgment was entered in the suit, wherein the defendant was one of the plaintiffs, and the present plaintiffs were defendants; which judgment stands in full form. After this, can the defendant say that a cause of action did not accrue upon that receipt within three years next before the

bringing of the action, when it was brought within a few months after the confirmation of the award? I disregard all that was said about the effects of agreeing to submit, upon *Heart's* estate, to arbitration. It is sufficient to state, that in this case there is a promise to pay, should the sum mentioned in the receipt exceed the defendant's interest in that estate, and that has been ascertained by the defendant. When it was thus ascertained, the present cause of action arose.

PER CURIAM.—JUDGMENT AFFIRMED.

JOHN WADE v. JOHN ODENEAL.

The records of a court cannot be explained by parol testimony.

This was an action of DEBT, upon the act of 1774, (*Rev.* c. 105,) directing the duty of sheriffs with respect to insolvent taxables, and imposing a penalty of £20 for collecting taxes of one whom the sheriff has returned an insolvent.

The cause was tried before MARTIN, Judge, at Rockingham, on the last circuit; when, upon *nil debet* pleaded, the clerk of the County Court produced a list of the insolvent taxables in the hand writing of the defendant, the sheriff of Rockingham, in which was the name of the plaintiff. The list was endorsed "*allowed*," and the clerk swore that no other order was ever made by the County Court concerning the insolvents of that year, and that the defendant had settled the county taxes by that list. The defendant objected to the clerk's giving any parol evidence, but the objection was overruled, and a verdict being returned for the plaintiff, the defendant appealed.

W. A. Graham, for the defendant.

No counsel appeared for the plaintiff.

RUFFIN, Judge.—The acts 1774 (*Rev.c.* 105,) and 1786, (*Rev.c.*255, *s.*2,) and all the subsequent statutes providing

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for a credit to sheriffs for insolvents, refer to an allowance to him of them in the first instance by the County Court. This was provided for by the two old statutes of 1760, c. 2, and 1768, c. 6. Down to this time, the sheriff passes his list of insolvents at the treasury, only upon the authority of the order of his County Court at home, specifying each insolvent, and the amount of the whole. The mischief intended to be remedied by the act of 1774, under which this action is brought, is that of the sheriff collecting, and putting in his private purse, monies which he had not paid, and was not liable to pay, into the treasury. Unless therefore an order be passed by the court which would exonerate the sheriff from accountability for these taxes, the case has not arisen in which he incurs a penalty for collecting them, because they remain due to the public. The order or judgment of the court, is the efficient protection both to him, and the taxables.

The question is, how this judgment is to be proved. Courts of record speak only in their records. They preserve written memorials of their proceedings, which are exclusively the evidence of those proceedings. If they choose to keep minutes, which they understand and can act on to their own satisfaction, it is well. If from them, they can afterwards undertake to draw out the record to perpetuate it to their successors, or to communicate its contents to another court, I know nothing to prevent them, but the difficulty in their own minds, of being sure they make it, what it was intended originally to be. But until the record be so framed, another court cannot know more than the words of the minutes in themselves import. The records may be identified by testimony, but their contents cannot be altered, nor their meaning explained by parol. The acts of the court cannot thus be established. Here the testimony of the witness was indispensable to make out a case. Had he sent a transcript under the seal of his office of what was deposited there, nothing could have been made of it. It was necessary to prove that the list itself was in the hand writing of the defendant, to shew what it was, and

to explain what "allowed" meant. The objection taken to the evidence was a good one we think, and therefore, there must be a new trial.

PER CURIAM.—JUDGMENT REVERSED.

GEORGE W. MORDECAI v. JOHN PARKER.

The estate of one who holds in trust for creditors, with a resulting trust for the grantor, is not within the act of 1812, (*Rev. c.* 830,) subjecting equitable interests to sale by execution.

This was an action on the CASE, in which the plaintiff in substance declared, that the defendant being the sheriff of Edgecomb, and having in his hands sundry writs of *fieri facias* against one *Roderick Amason*, intending to injure the plaintiff, levied the said writs upon a tract of land, which had been conveyed by *Amason* to the plaintiff, after the *teste* of the said executions, when the said *Amason* had personal property in the county of Edgecomb sufficient to satisfy them.

Plea—*Not guilty*. At the trial at Edgecomb, on the last Spring Circuit, before DANIEL, Judge, the plaintiff produced a deed of bargain and sale to him, dated the 25th day of August, 1829, whereby *Roderick Amason* conveyed a tract of land to him in trust, to secure his, *Amason's*, sureties in a bond for $10,000, given upon his being appointed guardian to several infants. At the date of this deed, judgments for about $4000 were outstanding against *Amason*, executions upon which had a priority over it. These judgments were satisfied by the sale of the land conveyed to the defendant, together with that of other land belonging to *Amason*, and several of his slaves. But there remained in the possession of *Amason* personal property, amounting in value to $947, which was sold under executions upon judgments against him, which were subsequent to the deed to the plaintiff. No evidence was offered by the plaintiff of any injury to his *cestui que trust*, by a breach of the condition of the

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guardian bond, to which they were sureties; neither was the deed to the plaintiff impeached by the defendant.

For the plaintiff it was contended, that he was seised in fee of the land conveyed to him, and that the defendant having sold that land wrongfully, was liable to him for the value of the personal property which he had neglected to sell. But his Honor charged the jury, that the plaintiff being a mere trustee, and not showing any special injury to his *cestui que trust*, was entitled to nominal damages only; a verdict was returned for the plaintiff with sixpence damages, and he appealed.

Hogg, for the plaintiff.

The *Attorney General* and *Gaston*, *contra*.

RUFFIN, Judge.—Taking the deed to the plaintiff to be valid, he is tenant in fee, and a court of law cannot say that his fee is worth less than that of another. The argument for the defendant supposes that an interest remained in the maker of the deed. That is the case where there is a pure trust for a debtor, which can be sold under execution; but then the legal title is worth nothing, and is wholly divested by the sale. It has been held, that such a case as the present, does not come within the act of 1812, (*Rev. c.* 830,) and the reason was, that courts of law were incompetent to ascertain and value the trusts. That reason applies equally here; and therefore, the plaintiff was not called on for evidence upon that point. But the strong ground is, that we do not at law, see that the plaintiff is a trustee. We cannot take notice how he got the fee, nor what he intends to do with it. He has it, and that determines the value of his interest. The existence of the debts intended to be secured by the deed, or their non-existence, has a material operation upon the question of fraud in the conveyance, and to that end, they may be entered into. That determines the validity of the deed; in other words, whether the grantee is tenant in fee. Admitting him to be so, he is entitled to recover the whole estate. There must therefore be a new trial.

At law, a trustee is for all purposes seised in fee, and may sue for an injury to his estate without reference to the interest of the *cestui que trust*.

But a new trial would not be granted, if the jury had not found a verdict for the plaintiff for sixpence damages,

which carried the costs. For although the court erred as to the rule of damages, a verdict for the defendant would have stood, because the record shews, that upon another trial, the defendant must have a verdict. This action cannot be maintained for any purpose.

Where the defendant must finally prevail, a new trial will be granted, altho' the judgment below was for the plaintiff and he appealed.

It was necessary to sell the land upon the plaintiff's own shewing, since the chattels were not sufficient, had they been applied to this execution. To whom would the sheriff have to account for the surplus, if any? To *Amason*, and not the plaintiff.

The vendee of land bound by a *fi fa.* cannot maintain an action against the sheriff, for selling that land under the writ, instead of the chattels of the defendant.

But if the chattels had been fully sufficient, it would have made no difference. The conveyance was absolutely void to all intents and purposes, as against the judgment and execution. If one make a fraudulent deed, his creditor may at law seise the thing conveyed, although there may be other property; because the whole is void as to him. The creditor cannot indeed go into equity to clear the title from an alleged fraud, without shewing that it is necessary for his satisfaction; because that court is not to be put into action, if the party can get justice without it, and by the ordinary means of legal process. But where the party can establish the fraud at law, and thus shew the deed there to be void, he is at liberty to do so in the first instance. He asks no favors, and stands on his preferable right. Now a conveyance after the *teste* of a *fieri facias*, is void, upon the ground that it is fraudulent. So conclusive is the argument, that it is in fraud of the process, that nothing will be heard against it. The fact establishes the intent. The estate then, as respects the plaintiff in the execution and the sheriff, remained to every intent, the estate of *Amason*, the defendant in execution; and neither he, nor any body claiming under him, after execution, can allege any thing to the contrary. If indeed, the defendant in the execution, (admitting that the land remained his,) could shew that the sheriff had injured him by selling that before chattels, he might. But this is personal between them. It can injure the *legal* rights of no other person. And here, since it took all the property of both kinds, to satisfy the executions, there could be no injury even to

Such an action is personal to the defendant in the *fi. fa.*

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the defendant in the execution. Indeed the sheriff acted in good faith, and made only a just use of his lawful authority, in arranging the property so as to get satisfaction of all the process, as every good sheriff will always do.

PER CURIAM.—JUDGMENT REVERSED.

DEN *ex dem.* G. W. MORDECAI *v.* SAMUEL SPEIGHT.

A sale of land, under a *fi. fa.* made after the return day of the writ, but before it is returned, is valid—although the sale be not opened on the return day, and then postponed.

EJECTMENT, tried on the last circuit, before NORWOOD, Judge, at Pitt. The plaintiff claimed under a deed executed by one *Roderick Amason*, during the term of Edgecomb County Court, beginning on the 4th Monday of August, 1829. The defendant, under an execution issued from the same court, against *Amason*, *tested* the 4th Monday of August, and returnable the 4th Monday of November following, and the only question was, whether the defendant's title was affected by the following facts: The sheriff of Edgecomb, having the execution against *Amason* in his hands, advertised his property, together with that of many other persons, for sale on the 4th Monday of November, the return day of the writ; thinking that *Amason* had money to discharge the execution, the sheriff did not sell his property on that day, but postponed the sale without opening it, to the next day; the next day, viz: Tuesday, after the return day, the land in dispute was sold, and purchased by a person under whom the defendant claimed.

His Honor charged the jury, that as the sheriff's sale did not commence on Monday, the return day of the writ, his authority expired with that day, and that a sale made by him on Tuesday was void.

A verdict was returned for the plaintiff, and the defendant appealed.

The *Attorney General* and *Gaston*, for the defendant.

Hogg, contra.

RUFFIN, Judge.—There are two questions in this case distinct in themselves, though relating to the same subject. The first is, whether the sale of land under a *fi. fa.* be good, if made on the day after the process is made returnable, and before it be returned, and during the term of the court to which it is returnable. This is answered by the case of *Lanier* v. *Stone*, (1 *Hawks* 329,) affirmatively, and we see no reason for being of a different opinion.

The case of *Lanier* v. *Stone*, (1 *Hawks* 329,) approved.

The second is, whether the acts of assembly, directing the manner in which sheriffs shall sell lands and slaves, (*Taylor's Revisal, c.* 1096 & 1153,) do not render such a sale as this void. This we think, is answered negatively by *Pope* v. *Bradley*. (3 *Hawks* 16.) That case is said not to be in point, because the sale was opened, and because the reason for adjourning it, was a good one.—Those circumstances were adverted to for the purpose of establishing the propriety of the sheriff's conduct, even had he been called on to answer in that action; but not as establishing the purchaser's title. For the Chief-Justice plainly says, that on no principle could an irregularity in the adjournment annul the sale, and he founds himself in this, on the act being directory to the sheriff, and giving a penalty against him. And those are the grounds of the opinion we entertain. It would be dangerous to purchasers, and ruinous to defendants in execution, to require bidders to see that the sheriff had complied with all his duties. It is said however, that this will allow sales to be made at other places, besides the court-house, as the same section fixes both the place and the day. The difference is this, a purchaser knows, and is bound to take notice, that the sheriff cannot sell but at the court-house, and that a sale elsewhere, must be void. But the sheriff may sell on Monday, or in certain cases, and under certain regulations, he may also sell the next day. Now a bidder can no more know whether those provisions have been complied with, than

The case of *Pope* v. *Bradley*, (3 *Hawks* 16,) approved.

Purchasers at a sheriff's sale, are not required to see that the sheriff has complied with his duty.

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whether the sale has been duly advertised. We think indeed, that postponing the sale entirely by proclamation, is the same for this purpose, as beginning and then adjourning it. But that respects the remedy against the sheriff, and is not the principle which governs this case. For these reasons, the instructions given in the Superior Court are deemed erroneous, and the judgment is reversed.

PER CURIAM.—JUDGMENT REVERSED.

JOHN E. WOOD *v.* RICHARD BROWNRIGG *Ex'r.*

Under the act of 1816, (*Rev. c* 925,) a guardian is not authorised to recover compound interest, unless the ward can demand it of him.

DEBT, upon a bond made by the defendant's testator, payable to the plaintiff, as the guardian of a female infant. The ward married before this action was brought, and the only question on the trial was, whether the plaintiff was entitled to recover compound interest, after the marriage. SWAIN, Judge, at Bertie, on the last Spring Circuit, ruled he was not, and judgment being entered accordingly, he appealed.

No counsel appeared for the plaintiff.

Iredell, for the defendant.

RUFFIN, Judge.—The question arises on the construction of the act of 1816, (*Rev. c.* 925,) and I think there cannot be a doubt as to the meaning of the act. It does not change the rate of interest by reason of any stipulation as to the rate, expressly introduced into the contract, so as to attach to it through all time and in all hands. But it only provides that all *guardians* may recover compound interest, on bonds payable to them in that capacity. Why? Because they are generally liable for such interest—when that liability ceases, that is, when the wardship is at an end, the interest returns to the ordinary legal standard, because it is then a common debt, and not one

which the guardian is compelled to make, in the discharge of his duty to keep money out. As long as the money is the property of a ward, compound interest accrues, and no longer; for then the late ward, or late guardian may get it in. This was said before in the case of *Hooks* v. *Sellers*, at December term, 1829, and substantially held in *Ryan* v. *Blount*. (1 *Eq. Rep.* 382.)

PER CURIAM.—JUDGMENT AFFIRMED.

JOHN MOODY v. WILLIAM P. STOCKTON.

Bail may surrender their principal after a verdict, but before final judgment against them.

The act authorising such a surrender, necessarily authorises some mode of averring it; it should be by a plea framed so as to enable the plaintiff to deny the surrender, and contest the identity of the principal.

This was a SCIRE FACIAS against the defendant, as the bail of *Joseph W. Stockton*. The defendant pleaded several pleas which were tried before DANIEL, Judge, on the morning of Wednesday of the Fall term 1831, of Iredell Superior Court. All the pleas being negatived, judgment was then rendered for the plaintiff. In the afternoon of the same day, the defendant brought *Joseph W. Stockton*, the principal, into court, and moved to surrender him in his discharge. This was opposed by the plaintiff, but his Honor set the judgment aside, and permitted an entry of the surrender to be made. The bail was prayed in custody by the plaintiff, without prejudice to his right, to insist upon his claim against the defendant. Afterwards his Honor gave final judgment in favor of the defendant, and the plaintiff appealed.

Gaston, for the plaintiff.

Iredell, for the defendant,

HENDERSON, Chief-Justice.—The law which gives to the bail the right to surrender the principal before final judgment, gives necessarily therewith, the means of

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making that right effectual, if the surrender be after verdict, and before judgment. Although we know of no such plea, as one between the verdict and judgment, yet one must necessarily be allowed, for the verdict concludes all facts up to it, and if the surrender be at the same term in which judgment was rendered, a plea since the last continuance, will not do. In this case, the surrender was after verdict and before judgment, the court having set aside the judgment previously entered during the same term, as it rightfully could do, having power over the records during the whole term. The bail had the right to plead it, and properly speaking, should have pleaded it, to give the plaintiff an opportunity of controverting both the surrender in that cause, and the identity of the principal, which might possibly be denied upon the plea of a surrender. But in this case, there was no need of a plea, as the plaintiff moved to commit the principal, which admitted all that he could deny by a replication. It appearing therefore, upon the record, that the principal has been surrendered before final judgment in the cause, the judgment must be affirmed, but I repeat, it would be more regular to plead the surrender.

PER CURIAM.—JUDGMENT AFFIRMED.

DEN *ex dem.* TILSON B. DOUGLASS v. DANIEL SHORT.

Where a sheriff sells land for the taxes of two years, when he had a right to collect only those due for the last year, the sale is void, and his deed vests no title in the purchaser.

EJECTMENT, tried on the Fall Circuit of 1831, at Anson, before STRANGE, Judge.

The only question which it is necessary to present, arose upon the validity of a deed executed by the sheriff of Anson, to the lessor of the plaintiff, whereby it was recited, that the sheriff had sold the land in dispute to the lessor of the plaintiff, at a public sale made in April 1827, for the taxes due in the years 1824 and 1825.

The jury under the directions of the judge, found a verdict for the plaintiff, and the defendant appealed.

Mendenhall, for the defendant, contended, that the sheriff had no right to sell for the taxes of 1824, (*Act of* 1800, *Rev. c.* 547,) and having sold for those taxes, his deed was a nullity, and for this was cited *Jones* v. *Gibson*, (*N. C. Term Rep.* 41,) *Coltraine* v. *McCain*. (*Ante page* 308.) *Six Carpenter's case*. (8 *Co.* 146, *a.*)

Gaston, contra.

Henderson, Chief-Justice.—There are several questions made in the cause, which it is not necessary to consider, as we think the sale is void *in toto*, and gives no title to the purchaser, for want of power in the sheriff to sell for the taxes of the year 1824. The rule in regard to the validity of a sheriff's sale under a *fi. fa.* where he sells all the land levied on, does not apply: there the surplus of the money, after satisfying the *fi. fa.* belongs to the defendant in the execution. Therefore, if the sheriff professes to sell under several *fi. fas.* and all are void but one, the sale is valid by virtue of the good execution, and the surplus of the money, after satisfying it, belongs to the defendant in the execution, and his title is not affected by the misapplication, by the sheriff, of the purchase money to the void executions. This is matter of adjustment between the sheriff and the defendant in the execution, and the purchaser has nothing to do with it. It is sufficient that the sheriff had an authority to sell, and the valid execution gave him that authority. But a sale for taxes is governed by a different rule; there the whole thing is not sold, but the offer or proposition is, who will pay the tax demanded, for the least quantity of the land. Every cent of tax therefore, demanded, takes from the owner a portion of the land, while the sum overclaimed does not go into his pocket, or for his benefit. For although as in this case, some of the taxes may be really due, he may not choose to have them paid by this sacrifice, and the rule must be general. The quantity of land sold was therefore, improperly swelled, and we cannot separate and say how much was sold for the taxes,

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which the sheriff had a right to collect, and how much for those for which he had none. Neither can we settle it by the rule of proportion; for *non constat*, that there was no one present, who, had the proper sum been demanded, would not have paid that sum for a much less proportion of the land. A variety of causes might thus operate; a by-stander might have money enough to pay the tax which ought rightfully to have been demanded, and not enough to pay what was actually demanded, or he might not choose to purchase as much of the land. Sales for taxes, are sufficiently rigorous by the acts of the legislature, without being made more so by construction. I have not gone through the acts to shew that the sheriff could not, when he sold, include the taxes for the year 1824, as it is evident from a slight examination of them.

Per Curiam.—Judgment reversed.

The Roanoke Navigation Company v. John H. Green, *Ex'r. of* Solomon Green.

Where a testator in the event of the death of his executor, directed the County Court to appoint some person to administer his estate, the executor of the first executor, is not the executor of the first testator.

This was a scire facias, which recited that the plaintiffs had obtained a judgment against *Solomon Green*, as the executor of *William Green*; that *Solomon Green* was dead, having made a will, whereof he appointed the defendant executor, and praying to have execution upon that judgment, against the goods of the defendant's testator.

Plea—In substance, that although the defendant's testator was the executor of *William Green*, that the defendant had never administered any of the chattels of *William*, neither was the defendant the executor of *William*; because, that *William*, by his will, directed the Court of Pleas and Quarter Sessions of the county of Warren,

where he resided at the time of his death, in case of the death of *Solomon*, his executor, before he had fully administered, to appoint some suitable person to take charge of, and administer the residue left unadministered by his executor. And further, that *William*, by his will, gave to the person thus to be appointed by the County Court, the same powers as to such of his estate as should be so unadministered, as he had given his executor, the defendant's testator.

Replication—Admitting the plea, but averring that the defendant was executor to *William*, because the County Court had never appointed any person to administer the goods of *William*, unadministered by *Solomon*.

Demurrer and joinder—His Honor, Judge DANIEL, on the last Spring Circuit, at Warren, overruled the demurrer, and gave judgment for the plaintiffs, from which the defendant appealed.

Gaston and *W. H. Haywood*, for the defendant.

Badger, for the plaintiff, relied upon *Granbury* v. *Mhoon*, (*Ante* 1 *vol. p.* 456)

HENDERSON, Chief-Justice.—The affirmations of the court of probate cannot be controverted. In this case, the court affirms, that *John H. Greeen* is the executor of *Solomon Green*, and that *Solomon* was the executor of *William*; but it does not affirm, that *John* is the executor of *William*. That is an inference, drawn by the law, in certain cases; as where the executor of the first testator, was sole executor, or surviving executor; but not where the first testator by his will, declared that the executor of his executor should not execute his will, as I think *William* did in this case, by appointing some other person to execute it, upon the death of *Solomon*. A testator may appoint that his executors shall act jointly, or in succession. If these facts do not appear, they may be introduced by plea, as in the present case, and I adhere to the opinion given in *Granbury* v. *Mhoon*; that a copy of the will does not necessarily accompany the letters testamentary, and even if they did, in this case, it would only be again putting that on the

The case of *Granbury* v *Mhoon*, (*ante* 1 *vol. p* 456,) affirmed.

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record which already as fully appears, as if the probate had been set out at large, that *William Green* directed some other person, except the executor of *Solomon* to execute his will. I think the demurrer should be sustained, and the judgment reversed.

PER CURIAM.—JUDGMENT REVERSED.

THE GOVERNOR *upon the relation of* RICHARD FISHER

v.

CHARLES CARRAWAY *Ex'r.*

The sureties of a constable are not liable under the act of 1818, (*Rev. c.* 980,) for his omission, without instructions to the contrary, to sue out an execution against an insolvent debtor.

This was an action of DEBT, upon a bond executed by the defendant's testator, as surety to one *Brinson*, upon his being appointed a constable. The breach assigned was, that *Brinson* had not sued out execution for sundry small debts, placed in his hands by the relator.

Plea—Performance of the condition of the bond.

On the trial, before MARTIN, Judge, at Craven, on the last Spring Circuit, the case was, that *Brinson's* appointment was made in June, 1819; in July following, he received the notes, &c. due the relator for collection; all the debtors, but one *Hendrick*, were insolvent; *Hendrick* owed $3 75, and was very poor, but had a cow, some sheep and hogs, in the year 1821; and in April or May 1820, he, upon the death of his father, succeeded to a small tract of land.

For the plaintiff, it was contended, that the constable had been guilty of neglect, in not procuring satisfaction of this debt.

His Honor charged the jury, that a constable was not of course bound to take out execution for every debt which might be placed in his hands for collection; that if it was manifest that nothing could be made by an execution, it was no breach of duty in the constable not to take

one out, unless specially directed to do so: that an officer was bound to strict diligence—which was such diligence as prudent men used in the management of their own affairs: that in the application of this rule, the constable acted at his peril in not taking out an execution against *Hendricks*, for if that process would have made the amount due by him, the constable was guilty of negligence, and the condition of the bond was broken.

No special instructions were prayed for by the plaintiff. The jury returned a verdict for the defendant, and a new trial was then moved for, upon the ground, that the judge should have instructed the jury to find for the plaintiff, as diligence was a question for him to decide. The motion was overruled, and his Honor observed, that diligence being a mixed question of law and fact, a judge was not bound in his charge, to assume all the conclusions which the jury might draw from the evidence: that if this was the case, in complicated questions of fact, and in a protracted investigation, it would be impossible for the judge to assume all the various conclusions which the jury might deduce from the evidence, and then inform them what the law would be, if they should find the fact to be as he had assumed: that it was sufficient, in cases of this kind, to give special instructions as to the law arising upon any supposed state of facts, when such instructions were moved by counsel. The plaintiff appealed.

In mixed questions of law and fact, a judge is not bound to charge the jury upon a supposed state of the facts, unless moved to do so.

W. C. Stanly, for the plaintiff.

Gaston and *J. H. Bryan*, *contra*.

RUFFIN, Judge.—The act of 1818, (*Rev. c.* 980) may be said to make certain private agencies, official duties of a constable. If he be liable for negligence in the discharge of them, he must be so, either as other agents are, or as officers are, when under like circumstances they have process. The act does not create a new set of principles, upon which a peculiar responsibility is to be imposed on constables; but only provides that their sureties shall be liable for their acts as agents, when they themselves would be responsible upon their undertakings in that capacity. I take this to be the mean-

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ing of the statute; and think the Judge carried the rule of diligence as far as he could in favor of the relator. It is objected that he did not decide the question himself. I agree with his Honor in the opinion expressed by him, and for his reasons, that the plaintiff cannot complain: for if he was bound, yet upon such a mixed question of law and fact, it is sufficient to give general instructions, not in themselves wrong, unless the party prays for others more explicit, and in terms applying to the case on trial: but had such been prayed for in this case, they could not have been more favorable to the relator than those given. As to all the debtors but one, there was an absolute insolvency, which continued up to the trial of this suit: and there cannot be a reason why an agent should make the debt his own, by not pressing a pauper. That one was indebted in the petty sum of $3 75; and after the constable's year expired, had in 1821, a cow and a few sheep and hogs. He was very poor; but in 1820, in the fore part of the year, his father died, and a small piece of land descended to him which he has since sold. The plaintiff asks a verdict for that, because the constable neglected to have execution out at all times, so as to cover whatever might fall in. But no knowledge of the death of the father, of the descent or possession of the land by the debtor, or of any other property is brought home to the constable. In an ordinary private agency, would that be the rule? If execution had been sued by the relator, and delivered to the officer, would that be the rule? Certainly notice of property must be proved, before he is liable for a false return. I do not perceive that the union of the characters of agent and officer, in the same person, can make a difference. I think, the constable cannot be chargeable for neglecting to sue execution, unless upon the execution, if sued, he would have also been liable; for where is the use of an execution, at the expense of his principal, unless there be some probability of making the debt on it?

I think therefore that the relator has no cause to complain of the judge's charge; and that he might proper-

ly have told the jury, that there was no negligence.—And I cannot but express my gratification that such a case as this, is not to be sent back to another trial.

PER CURIAM.—JUDGMENT AFFIRMED.

WILLIE BAYNER v. JOSHUA ROBERTSON.

Goods which were the property of a decedent, cannot be seised in the hands of his donee, under a judgment against his executor. If the creditor seeks to subject them, he must charge the donee as executor *de son tort*.

This was an action of REPLEVIN, tried before DANIEL, Judge, at Martin, on the last Spring Circuit, in which the plaintiff sought to recover several slaves.

The defendant among other pleas, pleaded, that the slaves in question, were the property of one *Thomas Cox*, and upon this plea, the only question between the parties, arose.

The plaintiff claimed under a deed made by one *Stancil Bayner*, to secure his creditors; *Stancil Bayner* died, and the defendant took out letters of administration upon his estate; *Cox* obtained a judgment against the defendant as administrator, and sued out an execution, under which the slaves in question, were sold and bought by *Cox*. The defendant offered to prove that the deed under which the plaintiff claimed, was designed to defraud the creditors of the intestate. But his Honor refused to let the evidence go to the jury, observing, that if the deed was fraudulent as to the creditors of the intestate, it was valid against him, and his administrator; that *Cox's* execution was to be satisfied out of the assets of *Stancil Bayner*, in the hands of the defendant: that the slaves not being assets of *Stancil Bayner*, nor in the hands of his administrator, were not subject to that execution: that if *Cox* or any other creditor wished to reach those slaves, they should declare against the plaintiff, as executor in his own wrong, of *Stancil Bayner*; when the defendant

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might show that he had fully administered, by paying debts of an equal or higher dignity, to the value of the slaves; of which defence, the present action would deprive him.

A verdict was returned for the plaintiff, and the defendant appealed.

The *Attorney General* and *Badger*, for the defendant.

W. C. Stanly and *Hogg*, *contra*.

RUFFIN, Judge.—The action against a fraudulent vendee of goods as executor *de son tort*, when there is a rightful executor or administrator, is contrary to the analogy of the law of other cases, and is given only from necessity. It supposes, that the creditor cannot obtain satisfaction from the rightful representative; and therefore gives this mode of impeaching the fraudulent conveyance, because there is no other, and without some, the creditor would be entirely defeated. I do not mean, that the creditor must shew that he has first sued the true executor, and has been unable to fix him with assets. He may sue the fraudulent grantee first, but then he runs the risk of losing his suit, because the conveyance was not fraudulent, the donor or vendor not being indebted at the time of his conveyance, or not to an extent that could reasonably impeach his gift as being made with a view of defeating an existing debt, or one that he was about to contract. Where, therefore, there are assets in the hands of the creditor, there is neither a necessity that the creditor should, nor a probility that he will, sue the donee. And where the executor has been sued and fixed with assets, there seems to be no reason for allowing the action against the donee at all; for there is no necessity for it. The creditor obtains satisfaction without: and the deed which is good between the parties, injures nobody; for the goods conveyed to the donee could not be chargeable to the executor as assets, and therefore those found are exclusive of those goods. Much more does it seem to be proper, that upon such a judgment against the exeeutor, the goods of the donee should not be taken in execution.

The verdict shows that there are other assets in the proper hands to satisfy the judgment. And I cannot conceive a motive for this proceeding, unless it was a contrivance between *Cox* and *Robertson* for the latter to confess assets, when he had none, in order to defeat the conveyance to the plaintiff, and deprive him of the property, without first trying the question of title. Besides as the judge properly said in the Superior Court, there is another reason for trying that question directly in a suit against the donee; which is, that he may have paid the value to other creditors, and ought to be allowed for it. It seems to me that to sustain the proceeding would be to call forth actual fraud, to counteract one that was only probable, or merely alleged without foundation in fact. It would cause many administrations to be taken out, for no other reason than that of putting one claiming under a conveyance, to the disadvantage of being deprived of property without a trial first had; of being a plaintiff instead of a defendant.

PER CURIAM.—JUDGMENT AFFIRMED.

Ex parte CHARLES HAUGHTON.

The Supreme Court has no jurisdiction of an appeal from an order of the court below, allowing commissions to an administrator.

The case of *Potter* v. *Stone*, (2 *Hawks* 30,) overruled.

This was an application to the County Court of Chowan, for an allowance of commissions to the administrator of *Thomas B. Haughton*, deceased. The case commenced in the County Court, and came from the Superior Court of Chowan, upon the appeal of the next of kin. The facts attending the administration of the applicant, together with his accounts, were certified to this court, but need not be stated.

Iredell, upon opening the case for the next of kin, was asked by the Chief-Justice if it was not an appeal from the exercise of a discretionary power. The counsel cited *Potter* v. *Stone*. (2 *Hawks* 30.)

No counsel appeared for the other side.

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Henderson, Chief-Justice.—This is an appeal from the discretion of the court below, to that of this court; from a court having the means and the power of examining into facts, to one having neither. We can only act on facts, established either by the admissions of the parties, or the verdict of a jury. Except in equity cases, where we have a *quasi* original jurisdiction, this court has neither the power nor the means of ascertaining facts. And certainly, the commissions to be allowed an executor, administrator or guardian, depend on a great variety of facts. The nature and intricacy of the estate, the difficulty and labour of managing it, all ought to be inquired into; not the bare amount of the receipts and disbursements. This court therefore, has no jurisdiction. It is true, if the court below had allowed commissions, when by law none were due, or refused them when legally claimed, those mistakes in the judgment may be corrected upon appeal; but we perceive none such here. When we entertained jurisdiction, and decided the case of *Potter* v. *Stone*, the jurisdiction of the court had not been settled. It came close upon the heels of the old Supreme Court, a court of multifarious powers, in some cases having and exercising jurisdiction on the facts, in others restricted.

Per Curiam.—Appeal dismissed.

Benjamin Howell v. Arthur Barden *et al.*

In an issue of *devisavit vel non*, it was held by Henderson, C. J. and Ruffin, J. that declarations of the supposed testator, made after the execution of the will, were admissible to prove that it was obtained by fraud, notwithstanding the act of 1819, (*Rev. c.* 1004) to prevent frauds in the revocation of wills. Daniel, Judge *dissentiente*, but holding declarations made at the execution of the will, to be admissible as part of the *res gestæ*.

The case of *Reel* v. *Reel* (1 *Hawks* 248) approved.

This was an issue of devisavit vel non, as to a will of *Benjamin Howell*, sen. propounded by the plaintiff,

which was tried before MARTIN, Judge, at Greene, on the last Spring circuit.

The plaintiff having made out a *prima facie* case, the defendants offered to prove declarations of the supposed testator, made after the execution of the proposed will, tending to show that it was obtained by the fraud and undue influence of the principal legatee. But the presiding judge rejected the testimony. The plaintiff had a verdict, and the defendants appealed.

W. C. Stanly and *Mordecai* for the defendants, urged that the declarations were not offered to prove a revocation, as they were, for that purpose, excluded by the act of 1819, (*Rev. c.* 1004) but they were offered to prove that the will never had a legal existence, and to this point they contended they were proper. They cited *Reel* v. *Reel*, (1 *Hawks* 248) *Jackson* v. *Kniffen* (2 *John. Rep.* 36) *Doe* v. *Allen* (8 *Term. Rep.* 147.)

Gaston and *J. H. Bryan*, *contra*, relied upon the act of 1819, to prevent frauds in the revocation of last wills and testaments, and contended that the evidence offered, was within the mischief intended to be prevented, and for this was cited *Provis* v. *Reed* (15 *Eng. C. L. Rep.* 490) and *Smith* v. *Fenner*, (1 *Gallison* 170.)

RUFFIN, Judge.—The admissibility of the evidence, rejected in the Superior Court, was, as a general principle at the common law, determined in *Reel* v. *Reel*. The discussion in that case was full, and the decision is to be regarded by succeeding judges, not only with respect, but in my opinion, as authoritative. For this reason, I must say I do not consider that question open to dispute.

The stress of the argument for the plaintiff is, however, on the act of 1819, "to prevent frauds in the revocation of last wills." It must appear to every one who reads the opinions in *Reel* v. *Reel*, that the judges there thought that the statute did not affect the question. It is true, the supposed testator there, died in 1818, and therefore, the point did not directly arise. But the leading authority against the evidence, *Jackson* v. *Kniffen*,

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was not treated by the court as inapplicable, upon the ground, that the statute of frauds was in force in New-York. On the contrary, although the opinions of the majority of the judges profess to be founded on that statute, this court rejected the case altogether, and expressly adopted the opinions of the dissenting judges, *Spencer* and *Tompkins*, who held that the statute, any more than the common law, was not against hearing the evidence.

But as that was not the point of *Reel* v. *Reel*, the court have now treated it as yet undecided here, and deliberately considered the question anew. My own opinion is quite clear, that the case is not within the purview of the statute, nor within the mischief.

The act relates exclusively to the revocation of wills. It pre-supposes in every case a will, good *ab origine*, to exist. It does not profess to touch the validity of the instrument, as depending upon the formality of its execution, or the disposing capacity or purpose of the maker. Nor does it prescribe the evidence by which those facts shall be proved. Those requisites are left as they stood at the common law, or by other statutes. This act does not say, nor mean, that a writing having the prescribed forms of a will, but obtained by fraud, duress or undue influence, shall, by force of the formal circumstances, be a will. But it says, that such an instrument, having not only the forms, but having at its execution, been in reality the instrument it purports to be, shall only be *revoked* by another will, or other mode prescribed in the act. The very title shews this; which is, "to prevent frauds in the revocation of *wills*." In fine, the act goes wholly to a change of mind in the testator, and not to the original want of the *animus disponendi*.

Here, perhaps, I might properly leave the case, since it is our province only to ascertain the meaning of the legislature, and not to carry their enactments beyond their meaning, because we might think they ought to have gone further. Yet I think in this case, notwithstanding the argument and authorities offered for the plaintiff, that there is a plain reason why the statute was not made broader.

It is said, the admission of this evidence is an evasion of the statute, and will bring in all the evils that it was meant to remedy; that there is little difference between a declaration, "that I revoke my will," and "that paper never was my will, it is a forgery"—or "I was forced to sign it." And it is further insisted, that if the statute will not exclude it in all cases, yet the rule should be in analogy to it and exclude it in all cases, when the supposed testator had it in his power, by other means than his declarations, to destroy the operation of the instrument: as where he had possession of it, or lived long after, free of restraint, and could have made another will.

I admit, that evidence of such declarations may mislead a jury. So indeed, may almost all evidence submitted to them—especially, if it be competent for one purpose, and not so for another. This is incident to our tribunals as constituted, and not peculiar to this species of evidence. If it be competent for any purpose, the court must receive it, at the risk of misconception or misapplication by the jury. The law does not anticipate either, but the contrary; not a misconception because the court should explain the purpose for which it is received, and the point it tends to establish; nor a misapplication, because there is a reliance on the integrity of the jurors. There is no instance in which the legitimate and illegitimate purposes of introducing evidence, are more distinct or more obvious to a common understanding, than the one before us. The one is to determine, whether a will was made, and fairly made; the other, whether the operation of such an instrument, not destroyed, has been recalled. This last, the legislature has enacted, shall not be proved by parol. Can the court by any analogy say the same of the former? If we are to look to the policy, what is that which governed the legislature? It is not, that a will once made in writing is, from that circumstance, to be taken as necessarily in its nature continuing to be the will of the maker, until it be cancelled or revoked in writing; nor that it is not right to annul it, as soon as it is made to appear in any manner—whether by parol or otherwise—that it did not continue

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to be the maker's will. But the reason for not hearing the parol proof is, that there is not the *ordinary security* that it is true. The declarations sworn to, are those of a dead person, and generally will purport to have been made to the witness or witnesses alone. The law-giver may well act on the presumption, which experience proves to be too well founded, that many men are withheld from falsehood, less by the restraint of conscience, than by the apprehension of detection, and temporal punishment.—This is the principle of the statute. It repudiates the testimony, not because it ought not to be acted on, if true, but because, if false, there are no means of shewing it to be so, and because that circumstance constitutes an immunity to the witness, which tempts him to crime.

But when the evidence is of declarations relating to the creation of the will, there are not only the guarantees for veracity, common to other cases, but peculiar ones, arising out of the provisions of the statutes, passed to secure to the citizen the establishment of the will he has made, and against the imposition of one he has not made. Such declarations would be manifestly inofficious in the case of a will altogether in the testator's own hand writing. With respect to attested wills, there must in all cases be one, and where land is devised, two witnesses capable of speaking to the fact, to which the declarations purport to refer. There is then witness against witness, and the case is not within the policy which dictated the statute, more than within its words. Against this conclusion, the case of *Provis* v. *Reed*, (15 *Eng. Com. L. Rep.* 490,) has been cited. The opinion of Mr. Justice *Parke*, is founded on the policy of the statute of frauds; but Chief-Justice *Best*, and the other judges, do not go on the legislative provisions, but on general principles. I do not find that any other English Judge, but Mr. *Parke*, has entertained the opinion expressed by him—that is, for his reasons. The decision of the whole court was, it is true, against the evidence. But upon the general question, the respect due to those judges, is overborne by the authority of a judgment of our own courts, directly in point; and certainly the cases

cited in *Reel* v. *Reel*, prove that the court of common pleas erred in supposing that the question was made in that case for the first time.

The residue of the objection obviously goes to the weight of the evidence. It is true, there are many cases in which it would be entitled to but little weight; nay, but few in which it would be entitled to any. Yet if there be others, in which it would subserve the cause of truth and justice, it must be heard, leaving its effect to those whose province it is to weigh it. I think there is little danger in this, when the court can aid the jury by pointing out its legitimate tendency. When the fact of fair execution is once established by witnesses fully believed, the credit of the witnesses deposing to declarations inconsistent therewith, is at once subjected to a severe test. But suppose the declarations to be fully and satisfactorily proved, there are so many other motives for a testator to speak evasively or even untruly, both of the execution and the provisions of his will, besides that of disavowing it, in its actual form, to be his will, as to prevent much attention being paid by any body to such evidence. Looking at such evidence judicially, in a case in which it should be addressed to me, I should give it, if any, the least possible effect in the case supposed. For if the testator lived long after executing the instrument, had the possession of it, or could command it, or had it in his power to make another will, or to revoke the first, and did not, the fact of leaving it in existence, supported by the witnesses to it, to be repelled only by the uncertain evidence of his vague declarations, so far outweighs, in a reasonable mind, those declarations, as to make them but dust in the balance. The declarations were never made, or have been misunderstood, or were not serious, but intended to deceive. The truth in these respects is not likely to be obscured, because it is to be recollected, that the attesting or other witnesses on the other side, must speak to the very fact, to which the declarations refer. But it is likewise to be remembered, that the witnesses offered to support the will, may testify untruly. Of their truth, the subsequent declarations are, amongst other things,

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the test. Suppose a forgery of a will out and out, and that the supposed testator averred solemnly on his death bed, that he never had made a will, and that he meant to die intestate, and this established by indubitable proof. If this evidence could not be heard, a single perjured witness might establish a fabricated writing disposing of the largest personal estate, and two might carry all.—On this ground, evidence of this character must be admissible. As was said in *Reel* v. *Reel*, a contrary rule would palm upon the world wills never made, or made under duress—a proposition, the very stating of which shocks us. Wherefore, I think there must be a new trial.

HENDERSON, Chief-Justice.—I adhere to the opinion I expressed in the case of *Reel* v. *Reel*, nor do I think that the act of 1819, providing that no written will shall be altered or revoked by parol, affects this question. It is very clearly not within the words of the act, for they relate to what was once a will; these declarations are offered to show that the proposed script never was a will. The questions are essentially different in their nature. The act prohibits a will when actually made, from being altered or revoked by parol evidence. This is an attempt to exclude declarations going to show, that it is not and never was a will. Suppose the defendant had made a case going to show a forgery, and the question was nearly balanced; shall not the declarations of the alleged testator be heard, to determine the fact? Does the letter or the spirit of the act inhibit it? Yet if the testimony be excluded under the statute, in a case like the present, it must be excluded in all.—It is enough for courts to see and ascertain the legislative will, it is not for them to enquire, why the legislature has excluded parol evidence, upon questions of alteration or revocation, and permitted it in questions touching the making of a will. But I think, I can perceive why they inhibited it in the one case, and not in the other; in the first place, if the written will be established, there is clear and certain proof of what was the will of the testator, at one time. By admitting mere parol

declarations of revocation or alteration, a very uncertain and questionable will may be substituted, by the perjury and misrepresentation of witnesses. for one clearly established, and there are no means of preventing these perjuries, as they point to nothing, by which their falsity may be detected. Mere words, such as "I revoke my will," which were admissible before the late statute, cannot be easily disproved, because they may be sworn to have been uttered, when no one but the perjured witnesses were present. But it is not so with declarations that the script in question, never was the will of the supposed testator; they refer to the time of the alleged making—to the opposing proof which supports the will—and they may be weighed and compared with it. This policy is not confined to the act of 1817. It is to be found in the book debt law; a person may swear to his account for goods sold and *delivered*, (not sold only,) or for *work* and *labour* done; but not to a special agreement, or even to money lent, because the latter are incapable of disproof; they point to nothing, by which their truth can be tested. It is otherwise as to goods sold and delivered, or work and labour done. There is some chance of opposing false accounts of this description, for the consideration is something visible, something tangible, the want of which, may very probably be shown, and prevent imposition to any great extent. The same policy is visible in this statute. It is not for me to say how much such evidence ought to weigh, having, as I have elsewhere observed, no weights and measures for my own mind. It must, under the circumstances of each case, be left to the judgment and discretion of the jury as rational men; if they believe it, they will give it effect, if they do not believe it, of course they will pay no attention to it. I think a new trial should be granted.

DANIEL, Judge, *dissentiente*.—It is contended by the defendants, that the case of *Reel* v. *Reel*, is in point for them, and so it would be, were it not for the act of 1819, which has passed since the year 1815, the date of the supposed will in that case, and since the death

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of *Reel*, which took place in the year 1818. At the time of making the will in that case, it was lawful to prove a revocation by parol testimony; but now, by the act of 1819, no last will and testament can be expressly revoked but by writing, and in the forms pointed out by that statute. It is contended, that the statute can have no operation on this case, as it was intended to apply to the revocation of wills indisputably executed, and not to scripts offered as wills, and denied by the adverse party to be the wills of supposed testators. The act of 1819 is a copy of part of the statute of frauds and perjuries, (29 *Cha.* 2.) and the same decisions which have taken place in England since the statute, on questions similar to the one now under consideration, as well as decisions in those states of the Union which have adopted it, ought to govern us in deciding the present case. In the case of *Provis* v. *Reed*, it was decided, that "declarations of the testator in subversion of a will made subsequent to the time of its date, are not admissible in evidence, though both parties claim under him, and though they are offered with a view to shew the manner in which the will was executed." But the Chief-Justice, in delivering his opinion said, "no case had been cited in support of such a position and we shall not for the first time establish a doctrine which would render useless the precaution of making a will; for if such evidence were admissible, some witnesses would be constantly brought forward to set aside the most solemn instruments." In Massachusetts, a similar statute to the act of 1819, has been enacted, and the same rule has been adopted. (*Smith* v. *Fenner*, 1 *Gallison* 170.) So in New-York there is a like statute, and a like adjudication. (*Jackson* v. *Kniffen*.) After such a chain of authorities, all establishing the same doctrine, it would be unwise in us to lay down a different rule; if we did, it appears to me, the act of 1819 would be rendered inoperative. Parties would only change their position from parol proof of a revocation of a will, to an attack upon its execution, by introducing parol evidence of the subsequent declarations of the testator; so all the evils of fraud by

the parties, and perjury by the witnesses, would be let in, which the Legislature has so studiously endeavored to shut out. When I lay down the rule in this manner, in the case before the court. I do not wish to be understood as excluding parol evidence of the declarations of a testator, made at the time of the execution of a will. Such declarations are a part of the *res gestæ*, and are admissible. (1 *Thomas' Coke* 761, 763, *note.*) I think a new trial should be refused.

PER CURIAM.—JUDGMENT REVERSED.

THE JUDGES *upon the relation of* TITUS J. OATS *et al.*
v.
DAVID H. BRYAN *et al.*

The act of 1819, (*Rev. c.* 990,) requiring clerks to renew their bonds, does not make their offices annual appointments, but gives cumulative securities for the performance of their official duties.

The defendant *Bryan*, being clerk and master of the court of equity for the county of Johnston, on the 26th of March, 1823, gave a bond and sureties, with the usual condition for the faithful discharge of the duties of his office. On the 24th of March, 1824, he gave a similar bond with different sureties, and so also on the 29th days of March, 1825, and 1826.

By an order of the court of equity for Johnston county, a large estate held by the relators, as tenants in common, with others, was sold by the clerk and master, and the purchase money directed to be paid to the owners as they were respectively entitled. The clerk and master began to receive the purchase money in March, 1823, and continued the receipts until March, 1827.

At the term of the Superior Court of Johnston, held on the 4th Monday of March, 1828, the defendant *Bryan*, failed to renew his bonds, and a successor was appointed. At the same time, the guardian of the relators, they being infants, applied to *Bryan* for their share of the

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purchase money, but he was unable to pay it, and suits were soon after instituted on the two first bonds above mentioned, and afterwards, on the others, and the non-payment of the money due the relators, assigned as a breach of their conditions. The defendants after *oyer*, pleaded performance, and the act of 1810, (*Rev. c.* 800,) limiting actions on certain office bonds to six years.

The above facts were submitted to Norwood, Judge, in the shape of a case agreed, at Johnston on the Spring Circuit of 1831, when judgment was rendered for the plaintiffs, and the defendants appealed.

In this court, the four cases were considered together; the questions discussed were those which arose between the defendants.

Hogg, for the sureties of 1824.

Gaston, for those of 1825.

Badger and *Devereux*, for those of 1826.

W. H. Haywood, for the plaintiffs.

Henderson, Chief-Justice.—The act of 1793, (*Rev. c.* 384,) and the act of 1819, (*Rev. c.* 990.) requiring clerks and masters in equity, and the other officers mentioned in them, to renew their bonds at stated periods, does not make each renewal of the bond, a new appointment to office, but the new bonds are made additional securities for the performance of the official duties of the incumbent. The office is vacated by neglecting to renew the bond, not by doing so. The bonds thus given are cumulative; the old sureties continue bound for the performance of all the duties then resting upon the clerk, as well as for those which should thereafter arise, during his continuance in office; the new sureties are also bound in the same manner, from the time of their executing the bonds, until the office determines. Some official duties are of a continuing character, the obligation to perform them, remaining until they are performed. Of duties of this kind, there may be several breaches, or rather breaches at several different times, and a breach at one time does not put an end to the official obligation, so that an-

other breach of the same duty cannot occur. Breaches of this kind. are most commonly, acts of omission, an instance of which is that assigned by the plaintiffs, viz. the non-payment of the money due the relators. This is a continuing duty, and if not performed when an additional bond is given, it attaches upon the new bond, and also continues obligatory on the old ones. There are other acts which being once done, cannot in their nature be done again. Acts of this kind, which are breaches of duty in a clerk, being I presume, acts of malfeasance, can be only assigned as breaches of a bond in existence at the time they happened, they are not covered by bonds given afterwards. I do not intend to specify any act of this kind, but leave them for discussion when proper cases shall arise—all intended to be decided in this case is, that the neglect of the clerk and master in not keeping the money of the relators safely, and paying it over to them. or to some one authorised to receive it for them, is an act constituting a continuing violation of official duty. and may be assigned as a breach of any bond which he has given. Judgment must therefore, be rendered for the plaintiffs upon all the bonds, and must include damages, at the rate of twelve per centum per annum, upon the money due the relators, from the time of the clerk and masters neglect to pay it over. The act of 1819, (*Rev. c.* 1002) being express upon this point, and including the sureties, as well as the officer himself.

Non-payment of money, received by a clerk officially, may be assigned as a breach on any bond given by him.

The act of 1810, barring actions upon certain official bonds, unless brought within six years, does not in its words, include the bond of a clerk and master, the words being "all suits on sheriffs, superior court clerks, and "clerks of the courts of pleas and quarter sessions bonds "shall be commenced," &c. Although a clerk and master in equity, is in strictness a clerk of a superior court, yet the legislature has, from the creation of the office in the year 1787, to the present time, constantly distinguished that officer from others, by the appellation of clerk and master. Courts of justice, have adopted the same appellation, and in fact, it has become general in all classes of society. The question whether a

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clerk and master's bond is within the act, does not arise in any of these cases, as the first money was received in March 1823, and the last suit was commenced in February, 1829, and no opinion is intended to be intimated upon it.

PER CURIAM.—JUDGMENTS AFFIRMED.

GEORGE E. CABINESS v. THOMAS MARTIN *et al.*

Probable cause is such a suspicion as would induce a reasonable man to commence a prosecution, and where a witness swore, that a magistrate upon the return of a state warrant, said that he 'would commit the defendant unless," &c.; and the magistrate had in fact said he "would bind the defendant over unless," &c.: It was held, that the variance did not constitute probable cause for a prosecution for perjury.

This was an action on the CASE, in which the plaintiff declared against the defendants for maliciously, and without probable cause, prosecuting him for perjury.—Upon *not guilty* pleaded, the cause was tried before DONNELL, Judge, at Rutherford, on the last Spring Circuit. The perjury for which the defendants had the plaintiff arrested, was alleged to have taken place on the trial of an indictment against the defendants, for a conspiracy to extort money from one *Horde;* and it appeared that *Horde*, having been arrested upon a charge of larceny, and brought before the defendant *Martin*, who was a justice of the peace, had been discharged upon his surrendering a bank note of three dollars to the person who sued out the warrant against him, and also executing to the prosecutor his own promissory note for $8,75. On the trial of the indictment against the defendants, the plaintiff swore, that the defendant *Martin*, had told *Horde* that unless he gave his note, and surrendered the bank bill as above mentioned, he would send him to jail. In this, it was alleged the plaintiff swore falsely, and it was contended, that the defendant had said, that unless he, *Horde*, gave his note, &c. that he should bind him to

appear at court. Much testimony was offered on both sides, on the trial, which it is not necessary to state.

The presiding judge charged the jury, that if the plaintiff had sworn, on the trial of the indictment against the defendants, that *Martin* had said he would send *Horde* to jail, by a mistake, yet if it was false, it amounted to probable cause and justified the defendants in suing out the warrant against him for perjury.

A verdict was returned for the defendants, and the plaintiff appealed.

Gaston, for the plaintiff.

Badger, contra.

DANIEL, Judge, after stating the facts, proceeded as follows:

We are of opinion, that if the facts were such as are contended for by the defendants, they would not make out a probable cause, to authorise their issuing a state's warrant, and prosecuting the plaintiff for perjury. In the case of *Munns* v. *Dupont*, (2 *Brown Rep. Ap.* 65,) Judge *Washington* in delivering the opinion of the court, asks "what is the meaning of probable cause. I understand it to be the existence of circumstances "and facts, sufficiently strong to excite in a reasonable mind, suspicion, that the person charged with "having been guilty, was guilty; it is a case of apparent guilt, as contradistinguished from real guilt. It "is not essential that there should be positive evidence "at the time the action is commenced; but the guilt "should be so apparent at that time, as would be sufficient ground to induce a rational and prudent man, who "duly regards the rights of others as well as his own, to "institute a prosecution; not that he knows the facts necessary to insure conviction, but that there are known "to him, sufficient grounds to suspect that the person he "charges was guilty of the offence." The material question in the cause, on the trial of which the plaintiff was alleged to have committed perjury, was, whether the defendants had fraudulently conspired to obtain by illegal means, the money and property of

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Horde. In the ascertainment of the guilt or innocence of the defendants, on the indictment for the conspiracy, it was quite immaterial whether the plaintiff swore that the words used by *Martin* were, that he would send *Horde* to jail if he did not give up the three dollar bill, and give his note for the balance, or whether he swore that *Martin* said, he would bind him over to court, if he did not give up the property. *Horde* had been arrested for laceny, and it was the duty of the justice, before whom the warrant was returned, to have bound him over to court, whether he was willing or unwilling to give up the money, if in the opinion of the justice, the evidence proved him guilty of the charge. But upon the question whether the defendants wished, by their oppressive conduct, to extort money from *Horde*, which in truth, was the fact that the plaintiff's evidence was offered to establish, the words used by the magistrate in either way, viz: that he would send him to jail, or bind him to court, if he did not deliver the money, would have the same effect. The jury could not have been misled by the variance in the words sworn to by the plaintiff, from those that in fact were spoken by the magistrate. The difference between the words spoken by the magistrate, and the words which the plaintiff swore he made use of, was not sufficient to excite in the minds of the defendants a reasonable suspicion that he had committed perjury. If the justice had said he would bind *Horde* to court if he did not give up the money, then the money must have been surrendered, or *Horde* must have gone to jail, if he had been unable to procure bail. We think the court and jury could not have been misled by the variance in the expressions used; and it appears to us, that no reasonable mind could suspect that the witness was guilty of perjury. We therefore think, that the facts disclosed, did not amount to probable cause, and a new trial should be granted, which is done accordingly.

Per Curiam.—Judgment reversed.

URIAS COLLINS *v.* MARTIN NALL.

Sheriffs although elected for one year, by the act of 1777, (*Rev. c.* 118,) hold their office, until the qualification of their successor.

Although sheriffs are elected at stated terms of the County Court, they hold their offices, not from the court at which they were elected, to the next court, when an election takes place, but for one year.

This was a petition under the act of 1809, (*Rev. c. 773*) for damages done to the plaintiff's land, by its being overflown by the defendant's mill-pond. On the trial before SWAIN Judge, on the Spring Circuit of 1831, at Wake, the only question arose upon the validity of a deed, by the sheriff of Wake, for the land overflown. If the deed was valid, the plaintiff had no title, and upon this point, judgment was entered for the plaintiff, subject to the opinion of the court, upon the following facts:

Isaac Lane was elected sheriff of Wake, at the term of the County Court, held on the third Monday of May, A. D. 1815, being the 15th day of the month. At the ensuing sessions, commencing on the third Monday of August, 1815, being the 21st day of the month, *Lane* qualified as sheriff, according to the appointment made the preceding term. At May session, 1816, being the 20th day of the month, *William Hinton* was elected sheriff, who at August sessions following, being the 19th day of the month, qualified in pursuance of the appointment, made the preceding term. From May term, 1816, an execution, returnable to the ensuing August term, issued, which came to the hands of *Lane*, who levied it upon the land in question, and on the 20th of August following, the Tuesday of the County Court, he sold it and executed the deed.

His Honor being of opinion with the defendant, upon these facts, dismissed the petition and the plaintiff appealed.

The *Attorney-General* for the plaintiff.

W. H. Haywood for the defendant.

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Ruffin, Judge.—An important question was supposed to arise in this case, which upon a closer inspection of the record, is found not to do so. It has been treated as a case in which a person, whose term of office as sheriff, expired on the first day of the term of the court, upon the qualification of his successor, made a sale of land on the second day of the term, on a *fieri facias*, returnable to the same court. Two defects were alleged to exist in the sale. The first, that it was made too late, even if the sheriff's office had continued. This has been decided otherwise, in *Mordecai* v. *Speight* at this term, and before in *Lanier* v. *Stone*. The second, that the authority of the sheriff closed with his office. This last is a nice point, and it is one, which could not be ruled against the applicant, to say the least, without further consideration and research.

But it turns out, that the objection is not founded in fact. Mr. *Lane* was still in office, when he made the sale. By the record of the County Court, appended to the transcript filed here, it appears he entered upon his office on the 21st day of August, 1815, and the case states the sale to have been on the 20th day of August, 1816. It is true, that the third Monday of August of the former year, was the 21st day of the month; and that the corresponding Monday of the latter year, was the 19th day of the month; and that the new sheriff qualified on this last day. But we do not count the year, from one Monday in the one, to a corresponding Monday in the next; but from one day to another day. The year is made up of so many days—and particularly is this mode of computing required in this case, since the statute has plainly a reference to the chasm, which might occur in the office by the compution from week to week, and has provided for that case. The act of 1777, (*Rev. c.* 118,) assumes, that a sheriff once appointed is bound to continue at common law until discharged; and enacts that he shall not be compellable to serve "more than one "year, and until the next succeeding County Court, af- "ter the expiration thereof." If the year expire before court, he must serve until court. But if the court shall

sit before the expiration of the year. the office is not then determined; he is to serve one whole year, at all events. And it must mean the year reckoned by days, because, in any other view, there was no necessity for extending the term of office to the court, as the terms are in fixed and corresponding weeks, and it cannot be supposed the provision was designed to meet only a change of the time of holding the court. The qualification of the successor does not affect the question. It may be, that there cannot be two sheriffs at once; but the question remains, which of these two was the sheriff. If *Lane* was compellable to serve a year; if he could not compel *Hinton* to serve before his own time expired; it seems a reasonable, indeed a necessary consequence, that he should have the whole time to complete the execution of process begun by him; and his successor and the court could not prematurely oust him, and thereby subject him to amercements and civil suits. His rights and powers correspond with his obligations. But if he could, upon the qualification of the new sheriff, have relinquished the office, he did not. He continued to act, in making this sale; and he made it within the period limited by law for his office: for in such a case certainly, both the days, that of the commencement, and that of the ending of the year, are not to be excluded. It is therefore valid; and the judgment below must be affirmed.

PER CURIAM.—JUDGMENT AFFIRMED.

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BALLENGER v. BARNES.

ALLEN S. BALLENGER *v.* ELIZABETH BARNES, *Ex'trx.*

When the plaintiff to rebut the plea of the statute of limitations proved that the defendant's testator in his last sickness, sent for him, and expressed great anxiety to adjust an unsettled account between them, and upon being disappointed, made entries of credits to which he was entitled, but no admission by him of a balance due the plaintiff was proved: It was held, DANIEL Judge, *dissentiente*, and HENDERSON Chief-Justice, *dubitante*, that the evidence was not sufficient to authorise a verdict for the plaintiff but that it should be left to the jury, with instructions to find for the defendant, unless the testimony proved the testator to have been willing that the account should be settled after his death.

A witness who is offered to prove what was deposed to on a former trial between the same parties, by a person who is dead, must give the substance of the testimony, not its effect.

ASSUMPSIT in which the plaintiff, the sheriff of Johnston, declared against the defendant, for money had and received by her testator, *Henry Barnes*, to his use, and specially, that her testator, being a deputy of the plaintiff, collected the taxes in certain districts of the county, and had not accounted for them to the plaintiff. There were several other counts which it is unnecessary to state.

Pleas—1st. That the defendant's testator did not assume and 2d, That he did not assume within three years.

The cause was tried before NORWOOD, Judge, at Nash on the last circuit.

Upon the issue on the first plea, the plaintiff offered a witness who had been of counsel for him on a former trial in the county court, to prove what a witness, since dead, had there deposed; the counsel stated that he had examined the witness, that he paid particular attention to his evidence, and had taken notes of it, which were then produced; that he did not pretend to have taken down the exact words of the witness, but that he believed that he was able to give the jury the whole of the testimony of the witness on the former trial, though not in the very words then used by him. Upon this statement his Honor admitted the evidence of the testimony of the deceased witness, and that testimony was material for the

plaintiff. The defendant's counsel then proposed to prove, that the deceased witness had deposed to other facts besides those in evidence, but his Honor refused to stop the plaintiff's case to receive the proposed testimony, observing that the competency of the plaintiff's witness could not be tested by the opposing recollection of another witness, but depended on the statement upon which it had been received; that the defendant would be at liberty, when called on for his evidence, to offer to the jury such proof on that point, as he might think proper. Afterwards the defendant proved other facts deposed to by the deceased witness on his cross examination, which had not been stated by the plaintiff's witness, which were material to the defendant, and then requested his Honor to direct the jury to disregard all the evidence of the deceased witness, which the judge refused to do.

All the transactions between the plaintiff and the defendant's testator, having happened more than three years before the commencement of the action, the plaintiff to repel the plea of the statute of limitations, introduced a Mr. *McLeod*, who deposed that he was sent for by the defendant's testator, a few months before his death, but within three year of the issuing of the writ, and requested to draft his, the testator's, will; that all his property was left to the defendant, his wife—that during the time the witness was writing the will, the testator requested the defendant to do something for his sister—that the defendant answered he had better leave her a legacy, to which he replied he was not able to do so, as he feared, when his affairs were settled and his debts paid, there would be but little left, too little to allow him to make a separate provision for his sister. The testator requested Mr. *McLeod* to be his executor, which was declined, but Mr. *McLeod* promised to render any assistance in his power to the defendant, who was appointed. The testator then entered into conversation as to his business, stated that he never had settled with the plaintiff, and seemed much distressed at the thought of not doing so. At his request, Mr. *McLeod* made a memorandum of sundry credits to which he was entitled, in a settle-

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ment with the plaintiff, several of which were similar to the following: "I paid Mr. *Ballenger* 142 dolls. at Feb- "ruary court, 1822 I think, for which I have no receipt "and this payment was made him towards a settlement "for tax money."

Another witness deposed to a conversation between the plaintiff and the defendant's testator, during his last ilness, within three years of issuing of the writ, in which the former said there never had been a settlement between them, which was admitted by the latter, who said he wished they could come to a settlement.

A witness introduced by the defendant, deposed that a few days after the will was drawn by Mr. *McLeod*, he was sent by the defenant's testator to the plaintiff, to request the latter to come and see him, that they might arrange their business and have a settlement, to which the plaintiff returned no answer. That afterwards, in consequence of a similar request, he again went to see the plaintiff during the sitting of the County Court, and was informed by the plaintiff that he could not then go, as he was attending upon the court; that the witness asked him to come directly after court, to which the plaintiff made no reply. It did not appear that the plaintiff had any other claim against the defendant's testator, except that for which this action was brought.

His Honor informed the jury, that when a man admitted the existence of an unsettled account, and declared a willingness to settle it, a promise to pay what should be ascertained to be due was implied, and the defence of limitations, would be thereby waived, for to what purpose, it might be asked, was a settlement to be made, unless the balance when ascertained, was to be paid. And therefore he instructed the jury, that if they were satisfied from the evidence, that the defendant's testator did admit the existence of an unsettled account between him and the plaintiff, and declare his willingness to come to a settlement with the plaintiff, they would be warranted in finding against the defendant upon the plea of the statute. No modification of these instructions was asked, nor was any exception thereto taken,

the counsel for the defendant only insisting that there was no evidence to rebut the plea of the statute. A verdict was returned for the plaintiff, and a motion for a new trial being overruled, judgment was entered accordingly. The cause having been tried in the County Court, and the defendant having failed to reduce the amount recovered in that court, his Honor gave judgment for the additional four per cent. imposed by the act of 1807, (*Rev. c.* 713.) The defendant appealed.

The *Attorney-General* and *Gaston* for the defendant, contended,

1st. That the judge had erred in not directing the jury to disregard all the testimony respecting what the deceased witness had deposed to on the former trial. For this was cited 1 *Philips on Evidence* 215, and *Lord Kenyon's* opinion in *Rex* v. *Jolliffe*, (4 *Term. Rep.* 290,) *Moseley* v. *Moseley*, (2 *Hay.* 305.)

2d. That there was no promise by the defendant's testator, within three years, which was a waiver of the statute of limitation, and cited *Heyling* v. *Hastings*, (*Salk.* 29.) *Quantock* v. *England* (*Burr* 2628.) *Loyd* v. *Maund*, (2 *Term Rep.* 760.) *Bryan* v. *Horseman*, (4 *East.* 599.) *A'Court* v. *Cross*, (11 *Eng. C. L. Rep.* 124) *Miller* v. *Caldwell*, (16 *Ib.* 168) *Knott* v. *Farrren*, (*Ib.* 191.) *Fearn* v. *Lewis*, (19 *Ib.* 98 and 326.) *Rowcroft* v. *Lomas*, (4 *M.* and *S.* 457.) *Hillings* v. *Shaw*, (2 *Eng. C. L. Rep.* 236.) *Beale* v. *Nind*, (6 *Ib.* 517.) *Sands* v. *Gelson*, (15 *John. Rep.* 511.) *Bell* v. *Morrison*, (1 *Peters* 351.) *Scales* v. *Jacob*, (13 *Eng. C.L. Rep.* 85.) *Witzell* v. *Bussard*, (11 *Wheat.* 309.) *Bangs* v. *Hall*, (2 *Pick.* 374.) *Ferguson* v. *Taylor*, (1 *Hay.* 20.) *Bank of Newbern* v. *Sneed*, (3 *Hawks* 500.)

3d. That the judge below erred in entering up judgment for the penalty imposed by the act of 1807.

Badger and *Devereux* for the plaintiff, contended,

1st. That no objections could be made to the charge of the judge, as there was no exception taken in the court below. *Hemphill* v. *Hemphill*, (*ante* 2 *v. p.* 291.) *Atkinson* v. *Clarke*, (*ante* 174.)

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2d. That there was no error in receiving the testimony as to the evidence of the deceased witness, for which was cited, *Mayor of Doncaster* v. *Day*, (3 *Taun.* 262.) *Ennis* v. *Dorristhrone*, (1 *Philips E.* 215.) *Doe* v. *Passingham*, (12 *Eng. C. L. Rep.* 209,) *Street* v. *Bovington*, (5 *Esp. R.* 58.) *Jackson* v. *Bailey*, (2 *John. Rep.* 17.)

3d. That the allowance of the additional four per cent. was a matter purely discretionary with the judge below, and could not be revised upon appeal.

4th. That the judges charge was correct, the jury warranted in finding a verdict for the plaintiff, and for this was cited *Ferguson* v. *Fitt*, (1 *Hay.* 139.) *Peebles* v. *Mason*, (*ante* 2 *vol. p.* 367.) *Colledge* v. *Horne*. (11 *Eng. C. L. Rep.* 59, *Ballie* v. *Lord Inchiquin*, (1 *Esp. Rep.* 435.) *Frost* v. *Bengough*, (8 *Eng C. L. Rep.* 318) *Loyd* v. *Maund* (2 *Term. Rep.* 760.)

Henderson, Chief-Justice.—This is a most perplexing question. It is clear from the frequent acknowledgements made by the testator, not long before his death, that there were many unsettled accounts between him and the plaintiff, and that he desired to settle them in his life time. The credits which he directed *McLeod* to write down, plainly point to the nature of those accounts, and show that they were for the tax money received by him, as the collector and deputy of the plaintiff. But the amount due, if any thing, does not appear, from his admissions, otherwise than it can be collected from an observation made to his wife, that he was largely indebted, but to whom he did not even allude, further than can be inferred from the accounts between him and the plaintiff, being principal the subject of their conversation. It is very unlike an acknowledgement made by a person by agreeing to enter into a settlement, or that another should settle for him. In a case of that kind why settle, unless the balance due was to be paid? An admission of that kind would be a waiver of the statute, for the defendant says, "I can and agree to stand upon my rights—I can do myself justice in the settlement." In this case, there was a great anxiety on the

part of the testator, to settle himself in his life time, that he might do himself justice, and a regret expressed that it could not be done upon the plaintiff's last visit. His sending twice for the plaintiff, just before his death, evinced his great desire, that the settlement should take place, in his life-time and under his inspection, this was the settlement he was anxious and willing to have made—not one after his death, to which his estate is now called, and which the argument must affirm, to derive any thing from his admissions, to be the one he was willing to have made. The statute was passed to avoid litigation upon doubtful claims, and therefore when the doubt is done away by the admission of the party, or the benefit waived by him, it was thought to be in accordance with the spirit of the act, to declare, it formed no bar to a suit. But here we are left entirely in the dark, the statute has not been waived, by an agreement of the defendant's testator to settle, except in his life-time; and the proof is rather of an anxiety to settle, than a formal agreement, that the accounts might be settled at another time, or otherwise than by himself in prospect of death. All the mischiefs of the statute will be let in, as the admission does not aid in settling the amount due, nor can we be satisfied, that these are the accounts referred to; there may be others, and the credits entered by *McLeod* might not be all his payments, but only those for which he had no receipt, and his having them put down does not prove that he was willing that a settlement should take place after his death, but a wish to prepare for the worst. Upon the whole, I am inclined to think from policy as well as justice, a new trial should be awarded. There cannot be a non-suit, as that is entered where the plaintiff does not support his action by proof, not where the defendant supports his plea.

There is nothing in the objection that the witness who was examined by the plaintiff, as to the testimony of one who had been sworn on a former trial, did not profess to give the very words of the deceased witness, but the substance only. No man can give the

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words where the testimony exceeds a single sentence.—The witness himself, if desired, after closing his testimony to commence and go through with it again, could only give the substance in many parts. The difficulty has arisen from the English reporters confounding substance with effect: the latter usually will not do—it must be the words, or the substance. If the witness professed to be able to give the whole, it was proper to hear him, and when it appeared afterwards, that he was mistaken and omitted some material parts, according to the testimony of another witness, the court could not decide between them, and if it could, and the addition placed the whole of what the dead witness said before the jury, they would then receive it as evidence. They must be satisfied that they have the whole of what the witness deposed to, before them; they must have all or none, as the whole is to be explained by the whole and by every part. I do not know in such a case how the court could do otherwise.

I feel better satisfied in sending this case to a second jury, as the verdict is large, upon a very stale demand and against the estate of a dead man, although I am not entirely satisfied on the point of the statute of limitations. But there was no acknowledgment of a debt, or balance due, or an agreement to settle then or at any other time, but a great anxiety to have a settlement in his life-time. It evinced great unwillingness, for what is the object of this suit, viz. a settlement after his death, and that by an action.

Ruffin, Judge concurred.

Daniel, Judge, *dissentiente*, after stating the case proceeded: All these facts were sufficient to authorise the jury to find that the defendant's testator had acknowledged a subsisting debt due by him to the plaintiff. Upon a plea of the statute of limitations, the burthen is thrown upon the plaintiff, either of proving an express promise made by the defendant within three years, or an acknowledgement that the debt still subsists, and that acknowledgement is evidence, from which a new promise can be inferred, (*Heyling* v. *Hastings*, *Ld. Ray* 421,) or a new pro-

mise is implied by law, or a new debt created. (*Bryan* v. *Horseman* 4 *East.* 599.) It is sufficient, if the jury find the fact of an acknowledgement, without finding a new promise by the defendant, for the law infers the promise. Neither is it necessary that the promise should be made to the plaintiff; it is sufficient, if made to a third person, to take the case out of the statute. (*Halliday* v. *Ward* 3 *Camp.* 32, *Mountstephen* v. *Brooke*, 5 *Eng. C. L. Rep.* 243). If evidence be given by the plaintiff, to prove the existence of the debt *aliunde*, then it seems that any expressions of the defendant, which tend to show, that it has not been paid, may be left to the jury, but if such evidence be not given by the plaintiff, a mere admission by the defendant, that a debt claimed has not been paid, will not be sufficient unless accompanied with the further admission, that the debt once existed, (*Rowcroft* v. *Lomas* 4 *M.* & *S.* 457.) The request of the defendant's testator to Mr. *McLeod* to make out the list of credits, for which he had no receipts, preparatory to a settlement with the plaintiff, necessarily amounts to an admission that the latter had a debt against him, to which these credits were to be applied; and if any other debt existed, to which those credits were to be applied, except the one now claimed by the plaintiff, the proof of that fact, lays upon the defendant. (*Baillie* v. *Inchiquin* 1 *Esp. Rep.* 435, *Frost* v. *Bengough* 8 *Eng. C. L. Rep* 318.) I think that the declarations of the defendant's testator amounted to an admission, that he owed the plaintiff a subsisting debt, and that the law raises upon this admission a promise to pay it, and as this took place within three years of the commencement of the action, that it is not barred by the statute.

The next objection is that the judge refused to strike out all the evidence given by the plaintiff respecting the testimony of the deceased witness, because it was proved on the part of the defendant, that material parts of the testimony had been forgotten by the plaintiff's witness. If a witness who has been examined in a cause dies, and upon a subsequent trial between the same parties, his testimony becomes material, his evidence may be proved by any one who heard it. (*Mayor of Doncaster* v. *Day*

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3 *Taun.* 262.) The witness offered to prove the testimony of the deceased, should have been present during the whole examination, and be able to state substantially the testimony then given. No one can be expected to narrate *in hæc verba*, what a witness deposed to on a former occasion, and the law does not require impossibilities. But the witness must be able to give the substance of the testimony, not its effect, or the impression which it made upon his mind. He should be able to narrate substantially the facts and circumstances which were then deposed to, as the witness would have repeated them, had he been alive and been examined again. The witness offered by the plaintiff, thought he could relate all that the deceased swore to on the former trial, that made him admissible, and the testimony of another person, who swore that there were facts which the first witness omitted, was to be left to the jury to weaken the effect of the evidence given by the latter. In other words, it went to his credit not to his competency, and the judge was right in refusing to strike the testimony out of the cause. The judge in the court below allowed the plaintiff to enter the judgment for four per cent. additional interest, from the time the judgment was rendered in the County Court. He did this because he thought the appeal was for delay. This was a question solely for his discretion, and although I think he erred, yet we have no power to revise his judgment. I think the judgment should be affirmed.

The allowance of four per cent additional interest, under the act of 1807. (*Rev c.* 713,) is a matter of discretion and cannot be revised upon appeal.

PER CURIAM.—JUDGMENT REVERSED.

THE STATE *v.* RANDAL MCDONALD, *et al.*

A search warrant can be granted only to seize stolen goods, and when one recited, that A had enticed the negroes of B to leave him, and that he was harboring them, and commanded the officer to seize them: It was held that the justice had no authority to issue it, and that it did not justify the officer.

The defendants were indicted for a forcible trespass in entering the dwelling house of one *Philip Brooks* and

carrying away several slaves. On the last circuit at Moore, before his Honor Judge DANIEL, the jury returned the following special verdict:

"That *Randal McDonald*, one of the defendants, was a constable of Moore county on the 29th day of August, 1831—that on that day *D. M.* another of the defendants, gave information upon oath, of the facts stated in the warrant herein after set forth, to *W. D.* a justice of the peace for the county aforesaid, who thereupon issued the same in the words and figures following: To any lawful officer, &c. whereas complaint has been made on oath before me, &c. by *D. M.* that a certain *Philip Brooks*, of &c. has tempted and persuaded his negroes, &c. to leave him, the said *D. M.* and now has the same concealed in his possession for the purpose of harboring the same, or conveying them out of the state—These are therefore to command you, &c. to search the possessions of the said *P. B.* and take the said negroes, if they are found, together with the said *Brooks* before me or some other &c. That the said warrant was delivered to the said *Randal McDonald* to be executed, who thereupon, accompanied by the other defendants, who were summoned by the constable to aid in the execution of it, proceeded to the farm of the said *P. B.* and the defendants then, in execution of the warrant, took into their possession some of the negroes above mentioned, who were laboring upon the farm of the said *P. B.* and in his service—that the defendants afterwards proceeded to the dwelling-house of the said *P. B.* and after the constable had demanded admittance into the house, and had been refused, with force and violence broke open the door thereof, and took into their possession others of the negroes abovementioned, who were then in the house, and carried them away. The jury further find that the said *D. M.* was entitled to the services of the above mentioned negroes, and that they were enticed and persuaded by the said *P. B.* to leave his possessions but that the said *P. B.* in good faith, claimed to be the lawful owner of them, and that he acquired possession in assertion of his supposed title, and that the said negroes came to his house before day light on the

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morning of the said 29th of April, 1831. The jury being ignorant, &c. Upon this verdict, his Honor gave judgment for the defendants, and Mr. *Solicitor Troy* appealed.

The *Attorney General* for the State.

No counsel appeared on the other side.

DANIEL, Judge, after stating the verdict as above, proceeded:

Since hearing the arguments here, and examining the authorities cited, I am satisfied that the judgment which I gave in the court below, was erroneous.

The question now to be determined is, whether the defendant *McDonald*, who was a constable, and the other defendants who were summoned by him to aid him, can justify under the warrant mentioned in the case.

At common law, a lawful warrant from a justice who has jurisdiction of the cause, justifies the officer who executes it, though it be irregularly issued; but it is otherwise, when the justice who issues the warrant has not jurisdiction of the cause. (1 *Chitty C. L.* 69, *Hawk P. C. Bk.* 2 *c.* 13 *s.* 10. *Com. Dig. imprisonment* 8, 9.) Warrants to search for stolen goods, are authorised by the principles of the common law. Without them, says *Lord Hale*, felons would frequently escape detection. (2 *Hale* 113.) A search warrant in this state, is to be granted only where a larceny is charged to have been committed. It is not to be granted without oath made before the justice, that a felony has been committed, and that the party complaining has probable cause to suspect that the stolen goods are in such a place, and he should show his reasons for the suspicion. (2 *Hale* 11[illegible], 150, *Chitty Crim. Law* 65.) The warrant then should be directed to a constable or public officer, and not to a private person. It is fit that the party complaining should be present, and assisting, because he will be able to identify the property which he has lost. (1 *Hale* 150.)

The justice who issued the warrant in this case, had jurisdiction to issue a warrant to search for stolen goods,

and whether the facts set forth in the affidavit of the applicant for the warrant, constituted a larceny of the goods, was for his determination. If he had issued a warrant, which professed to be an authority for the officer to search some particular place for stolen property, then the officer would have been justified in acting under such a warrant, although in truth and fact, no larceny had been committed. The justice is to judge and determine upon the questions of law, arising from the facts disclosed in the affidavit of the person making the application. The constable being a ministerial officer, must execute the warrant, and cannot decide whether it should have been issued on such an affidavit or not. I mean that the officer must execute, if the case was one which appeared by the warrant to be professedly within the jurisdiction of the justice. But it seems clear that a constable cannot justify an arrest, by force of a warrant from a justice, which expressly appears on the face of it, to be for an offence of which he has no jurisdiction, (2 *Hawk P. C.* 130 *Shergold* v. *Holloway*, *Strange* 1002.) The offence set forth on the face of this warrant, expressly appears to be of a description which a justice could not issue a search-warrant to remedy. The offence charged against the defendant, in the warrant, is that he "tempted and persuaded his negroes, *Tempy*, &c. to leave him, the said *Daniel McNeill*." The offence was not a larceny, it was only made a misdemeanor by the act of 1821, (*Tay. Rev. c.* 1120.) The justice did not intend, neither did his warrant profess to have been issued, to search for stolen property. In issuing such a warrant, he exceeded his jurisdiction, therefore it was void; and the officer was bound to know that it was void, and would be no justification to him if he executed it. The officer is not bound to know, whether a warrant, which upon its face was professedly within the jurisdiction of a justice, had been issued regularly or not. But if from what is stated on the face of the warrant, it appear that the justice has exceeded his jurisdiction the officer is bound to know that such a warrant is void and will be no justification for his acting under it; and if he

An officer can not decide whether a warrant is issued properly but he must at his peril determine whether he who issued it had jurisdiction of the matter.

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executes it, he does so at his peril. The judgment in the Superior Court must be reversed.

PER CURIAM.—JUDGMENT REVERSED.

THE STATE v. WILLIE CLEMONS.

The act of 1794, (*Rev. c.* 406,) to prevent owners of slaves from hiring to them their time, does not subject the master to an indictment, the remedy being against the slave alone.

The defendant was convicted on the following indictment:

"The jurors for the State, upon their oath, present that *Willie Clemons*, late of, &c. on &c. with force and arms at, &c. unlawfully did "permit his slave by the name of March to hire his own time to divers "persons, to the jurors aforesaid unknown, contrary to the act of the "General Assembly, in such case made and provided, and against, &c.

The defendant was convicted and judgment for the State being rendered by DANIEL Judge, on the last circuit at Beaufort, he appealed.

No counsel appeared for the defendant.

The *Attorney-General* for the State.

RUFFIN, Judge.—This is an indictment against the master; and it is founded on a misconception of the act of 1794. The statute directs the grand jury, to make "presentment of any slave." The great purpose of the act is to prevent and abate the nuisance, as was said in *Woodman's* case. The proceeding is therefore primarily against that; and the notice to the master is to give him an opportunity, as in other cases, of defending his slave, and not defending himself personally. It is true, the owner is indirectly punished, by having his slave hired out for one year. But that is only the incidental consequence of the judgment. The personal liability of the master, is for the penalty of twenty pounds. The act does not make him guilty of a misdemeanor, nor subject him to indictment.

The judgment of the Superior Court is therefore reversed, and the judgment arrested.

PER CURIAM.—JUDGMENT REVERSED.

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The State v. Solomon Roper.

Where a shawl was droped in an exhibition room, and picked up by the defendant, placed in a conspicuous situation and afterwards appropriated to his own use; it was held that he was not guilty of larceny. Can larceny be committed of goods that are lost? Qu.

The defendant was indicted for petit larceny in stealing a shawl. Upon the trial before Swain Judge, at Iredell, on the last circuit, many witnesses were examined, and the result of all the testimony was as follows: An exhibition of wild animals took place, in which the animals were placed on the inside of a circular tent, a chain was stretched so as to form a ring within the tent, the animals were between the chain and the sides of the tent, and the spectators admitted into the ring, formed by the chain—that upon one occasion, when the ring was full of spectators, the defendant was leaning upon the chain looking at the animals—that some person exclaimed "*there is a shawl,*"—that the defendant picked it up from the ground near his feet, shook some rubbish from it, threw it across the chain and leaned his body over it—that in a few minutes he took the shawl and secreted it under his coat, left the ring, went to his horse and put the shawl under a sheepskin, which served as a cover for his saddle. The owner of the shawl deposed that she did not know when she lost it, that she continued in the ring until she was told that the defendant had it, and that then, for the first time, she ascertained that it was lost.

For the defendant it was insisted, 1st. That the shawl being lost, and the owner unknown, it was not the subject of larceny.

2d. That unless the first taking was with a felonious intent, the defendant was not guilty of larceny, and of course must be acquitted, unless the jury believed that he intended to steal the shawl at the instant he picked it up and hung it on the chain.

His Honor charged the jury, that the guilt of the defendant did not depend upon the felonious intent having

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entered his mind at the instant he discovered the shawl. That if at the time he took the shawl from the chain, he knew to whom it belonged, but took it with the intention of stealing it, he was guilty, although he might have picked it up with an intention of preventing it from being injured. And further, that if at the time the defendant took the shawl from the chain, the owner was within the ring, and within the sound of his, the defendant's, voice, although she was unknown to him, if he took it with an intent to appropriate it to his own use, he was guilty of larceny. The defendant was convicted and appealed.

Gaston for the defendant.

The *Attorney General, contra.*

DANIEL, Judge.—In a late work of great learning and research, larceny is defined to be, "the wrongful or fraudulent taking and carrying away by any person, of the mere personal goods of another, from any place, with a felonious intent, to convert them to his, (the taker's,) own use, and make them his own property, without the consent of the owner." (2 *East. P. C. c.* 16 *s.* 2 *p.* 553.) But there must be an actual taking or severance of the goods from the possession of the owner, on the ground that larceny includes a trespass; if therefore, there be no trespass in taking the goods, there can be no felony in carrying them away. (2 *East. P. C.* 554. 1 *Hawk P. C. c.* 33 *s.* 1. 1 *Russell* 95.) It is a general maxim, that the ownership of goods draws after it the possession. But if the owner or person whose property is alleged to be stolen, be not actually or constructively in possession of it, the taking cannot amount to larceny. Therefore if goods were lost by the owner, and found by another, and the taking was *bona fide*, and not under a mere pretence of finding, and the finder afterwards, feloniously determines to appropriate them to his own use, it will not be larceny. But if the finder, at the time of taking the goods, knew who was the owner, the subsequent appropriation in a secret manner, or his denial of any knowledge of the goods, or any other acts, showing

a felonious intent, would be evidence to be left to the jury, from which they might infer, that the original taking was with a felonious intent. (*East. P. C.* 664. *Lear's case*, 215. *n.* 1 *Hale* 506. 2 *Ib.* 507. *Rex* v. *Walters* 3 *Burns Justice* 180.) If money by mistake is sent with a bureau to be repaired, and it is taken with a felonious intent, it will be a larceny, because the money was not lost. (*Cartwright* v. *Green* 8 *Ves.* 405. In the case before the court, it appears that the shawl was lost: and that the defendant took it up, after a by-stander had said "*there is a shawl,*" that he shook the dirt off it, and then laid it on the chain, and leaned over it for a few moments, and then secreted it in his bosom, and left the ring. The shawl had not been placed by the owner where the defendant took it from; but it had accidentally fallen there and was lost. The defendant when he took it up in a public manner, was ignorant of the owner: he continued thus ignorant until some time after he left the ring. The circumstance of his not calling out and proclaiming to the crowd, that he had found a shawl does not alter the case, neither does the circumstance of his laying the shawl on the chain, and leaving it for a short space of time, and returning and then taking it from the chain and carrying it away with a felonious intent. The owner had lost it: she had not regained possession of it, nor did the defendant know the owner. The taking from that place, (I mean the chain,) was not a taking from the possession of the owner. I think from the time the defendant took the shawl from the ground, until he delivered it to the owner, it was in his possession. As the original taking of the lost goods was without a felonious intent, the subsequent felonious asportation will not make the defendant guilty of larceny. I think a new trial should be granted.

HENDERSON, Chief-Justice.—This case does not present the question, whether lost property is the object of larceny; for the original taking of the shawl from the ground, was not attended by any circumstance, from which a felonious intent could be inferred; it was not

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done *clam et secrete*, but *openly* and *publicly*. The fraudulent and secret conversion of it afterwards to the defendant's use, could not impress a larcenous character on the original taking; at most it would only be evidence of the original intent, and the open and public manner in which the act was done, precludes all idea of a larcenous intent, and shows, too plainly to be controverted, that such intent, if it ever existed, was an afterthought. So far therefore as the secret and fraudulent withdrawal of the shawl from the chain, gave a larcenous character to the first taking, it is to be entirely discarded from the case, as even those that think that lost goods are the object of larceny, admit that the original taking must be with a larcenous intent—that no *after-thought*, or after-act can convert it into a felony. For my own part, thinking that there must be an *unlawful* taking from the possession of the owner, to constitute a larceny, I am of opinion, that lost goods are not the object of larceny. Some of my reasons, given in a much more forcible manner than I can give them, are to be found in Judge *Spencer's* opinion, in the case of the *People* v. *Anderson*, (14 *John.* 294.) Runaway slaves do not fall within the description of lost property, for from their nature, being intelligent beings, they are incapable of becoming estrays, in the legal or technical meaning of the word, which class of lost property, they in their runaway state more closely resemble than any other. Possibly this exception to the general rule may be founded in policy, as no vigilance of the owner can prevent their absconding, and the law attaches some degree of negligence to the owner in *losing* his property, and therefore does not protect it, when lost, by *high* penal sanctions. If the removal of the shawl from the chain, was a continuous act of the possession acquired by the defendant when he took it from the ground, and not a distinct independent acquisition, it was entirely immaterial whether he then knew who was the owner, or whether she was then within the ring, or within the sound of his voice; in neither case could it be a larceny. To constitute it a larceny, there must have been an

abandonment of the possession by the finder, before it was taken from the chain. Whether there had been such an abandonment, should have been submitted to the jury.—It is true it is a question of law, to be decided by the Court, but the facts upon which it arises, are to be ascertained, either by the admission of the party upon record, or by the verdict of the jury. The facts then are in no way ascertained, for abandonment is an intent of the mind, evidenced it is true, by an overt act, from which, as in the present case, the jury alone is competent to make the inference. There is no fact stated upon the record from which the law can draw the inference. The *quo animo* with which the defendant placed the shawl on the chain, standing by or near to it, is for the jury and not for the court, and I would not add a single instance of an inference of fact to be drawn by the law; and very clearly, this is not a case where any judge would do so. The act is too equivocal and subject to too many shades of difference, to infer from it any rule of intent applicable to all cases, and each case must be left to be decided according to its own particular and minute circumstances, that is, according to the *actual* intent in each particular case. I am of opinion therefore, that the defendant is entitled to a new trial, because the intention with which he placed the shawl on the chain, was not submitted to the jury, and without an abandonment of possession by him, no matter under what circumstances he afterwards withdrew it from the chain—no matter whether he knew who was the owner or not, or whether she was, or was not within the sound of his voice, such withdrawal was not a larceny. Should the jury be of opinion that there had been an *abandonment* of the possession, I am not prepared to say that the article was then placed in a situation to be the object of larceny. Did such abandonment by hanging it on the chain, if it was an abandonment, restore the possession to the owner, *without her knowledge?*—and did it merely cease to be lost property?—or did it only restore it to its *situation* when it was first discovered on the ground?

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These are questions I leave to future discussion, if the occasion should require it, for as I said before I am not prepared to decide them.

PER CURIAM.—JUDGMENT REVERSED.

THE STATE v. JOHN PATRICK, *et al.*

A remedial statute is to be construed, so as to advance the intention of the legislature, as where by the act of 1815, (*Rev. c.* 197, incorporating the Cape Fear Navigation Company, no power to collect tolls is expressly given, unless by that section which confers on the company, all the powers which the 8th section of the act of 1812, (*Rev. c.* 848,) gives to the Roanoke Navigation Company, and that section authorizes the latter company, to demand their tolls at the falls of Roanoke; it was held that the Cape Fear Navigation Company might demand their's at any place on that river.

This was an indictment for an assault upon one *Connor*, tried before NORWOOD, Judge, at Cumberland, on the last Spring circuit.

On the trial, the defendants justified the assault, upon the ground, that *Connor* had illegally attempted to take from their possession a steam-boat. The prosecutor on the other hand, justified the seisure as the collector of tolls due the Cape Fear Navigation Company. The jury found a special verdict to the substance following:

That the Cape Fear Navigation Company had appointed a place on the Cape Fear river, where tolls were to be paid, and had authorised the prosecutor to collect them—that on the day before the assault was committed, the steam-boat *John Walker*, arrived in the river opposite to the place where the tolls were to be paid, when she was hailed by the prosecutor, who demanded of the defendants, who were on board, the tolls due on her cargo, which was refused and the boat kept under way, against the orders of the prosecutor, up the river to a wharf, about three hundred yards above the place where the tolls were demanded, where her cargo was usually discharged—that on the next day,

before the cargo was discharged, the prosecutor having again demanded the tolls, which were refused, attempted to go on board and seise the boat, which was resisted by the defendants, when the assault was committed. Four points were presented by the verdict, and in case either of them were decided negatively, then the jury found the defendants not guilty; the points were:

1st. Whether that part of the act of incorporation, which authorised a seisure of the boat, was constitutional.

2d. Whether the demands for the toll could be made on the Cape Fear river.

3d. Could the seisure be made on the day after the demand was made, and

4th. When the boat had arrived at her place of discharge.

His Honor being of opinion that the section of the act of incorporation, which authorised the seisure, was unconstitutional, discharged the defendants, and Mr. *Solicitor Troy* appealed.

The *Attorney-General* and *Gaston* for the State.

Badger and *W. H Haywood* for the defendants, waived all the objections but the second. Upon this head they contended, that as by the first section of the act of 1815, (*Rev. c.* 897,) concerning the Cape Fear river, all the rights, privileges and franchises granted to the Roanoke Navigation Company, by certain sections of the act of 1812, (*Rev. c.* 848,) were granted to the Cape Fear Navigation Company, it was exactly as if those sections were literally inserted in the charter of the Cape Fear Navigation Company—that by the 8th section of the act of 1812 the Roanoke Navigation Company were authorised to demand and receive, at or near the Falls of Roanoke, certain tolls—and that of course the Cape Fear Navigation Company were only authorised to demand their tolls at the same place.

DANIEL, Judge.—The first question arising out of the special verdict is, whether the power granted by the charter

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incorporating the company, and giving the right to seise the boat is constitutional. We think it is constitutional. The act of 1815, entitled "an act concerning the navigation of Cape Fear river," changed the name of the "Deep and Haw river Navigation Company," to that of the "Cape Fear Navigation Company," and gave it all the rights, privileges and franchises granted to the "Roanoke Navigation Company," by certain sections of the act of 1812, entitled "an act for improving the navigation of Roanoke river, from the town of Halifax to the place where the Virginia line intersects the same." The act of 1815, adopts those sections and among them is the eighth, and declares that they shall constitute and form a part of the charter of the "Deep and Haw river Navigation Company." By the eighth section of the act of 1812, the Roanoke Company are authorised to demand and receive at some convenient place or places, at or near the Falls of Roanoke, for all commodities transported through any canal, lock, or sluice, made by the said company, tolls according to the following table and rates, &c." After setting out the table of rates, the section proceeds, "that if any person or persons, shall refuse to pay the tolls at the time of offering to pass the places appointed for their collection, and previous to passing the same, the collectors respectively, may lawfully refuse passage to the person or persons so refusing; and if any vesssel shall pass without paying the toll, then the said collectors respectively, may lawfully seise such boat or vessel and sell the same at auction for ready money, after advertising the sale at least ten days," the money to be first applied to the payment of the tolls and expenses of seisure and sale, and the balance to the owner of the boat. This remedy is given in addition to the personal liability of the owner of the boat, to secure the tolls to the company.

The prosecutor, who was collector of the tolls due the Cape Fear Navigation Company, went in the manner stated in the case, on board of the boat to seise and sell her, according to the directions of the eighth section of the act of 1812, when he was assaulted by the defend-

ants and driven from the boat, on the ground, as they say, that he had no legal or constitutional authority to seise and sell the same to pay the tolls, and therefore they made the assault in a necessary defence of their own property, which was about to be forcibly and illegally taken from them, and that they had no opportunity or right, by the act of 1812. to contest the demands of the prosecutor in any court of justice. We think, the law gave the defendants a right to have the claims of the prosecutor judicially investigated; they might on the distress being made, have replevied the property, and had the proceedings returned into a court of record, and had its judgment on the rights of the parties. The writ of replevin is a common law proceeding and may be used in this State, and is a remedy incident to every species of distress without process. It has frequently been used in this, as well as in all the states of the confederacy, which have adopted the common law. The objection therefore, that the property of the defendants might have been taken from them, under the eighth section of the act of 1812, without giving them an opportunity to defend themselves against any unjust claims for tolls, is not tenable and will not avail in this case.

A power of distress given a navigation company upon a refusal to pay their tolls is constitutional, the action of replevin being a remedy for its abuse.

The second ground of defence is, that the demand of tolls could not be made on the Cape Fear river. By the second section of the act of 1815. the rights, "privileges and franchises of the Deep and Haw river Navigation Company, shall extend from the sources of the several rivers and creeks running into the Cape Fear river, to the mouth of said river." By the seventh section of the same act, it is declared thus "And whereas by improving the navigation of the Cape Fear river, and the various streams that run into the said river, the company will become entitled to tolls at *different places*, but of unequal amount: *Be it enacted*, that the stockholders, or a majority of them, in a general meeting, shall have power to regulate and determine the tolls which shall be paid, and from time to time alter the said tolls."

It appears from this section. that the company are to be paid tolls; we perceive that there is a navigation com-

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pany formed; it has rights, privileges and franchises from the sources of the Cape Fear river, to its mouth, the company have a right to regulate and determine by their by-laws, what tolls shall be paid, so as not to exceed fifteen per cent. on their capital stock. This toll is directed by law to be paid. But where are they to be paid, ask the defendants? They call our attention to the 8th section of the act of 1812, adopted by the act of 1815, and say if the collector under this section, sets up a right to seise our vessel, we have a right to say that his demand of toll must be made according to the very same section, "at some convenient place or places, at or near the Falls of Roanoke," and if a seisure is made before a demand of the tolls shall have been made, at some convenient place near the Falls of Roanoke, it will be illegal and we have a right to resist it. If by adhering to the letter of the act of 1815, with its adopted sections of the act of 1812, we disappoint the intention of the legislature, and defeat the object contemplated, we may be sure that our construction is improper, but if we place a construction on the act, which will carry the intention of the makers into execution and effectuate the object contemplated, we may be equally sure our construction is right. What was the intention of the legislature? This is gathered from reading the whole act, as we gather the intention of parties to a deed or other written contract, by reading the whole of it. I presume the legislature intended by the act of incorporation, to enable the company to raise a capital, by means of which, the river Cape Fear should be made navigable, and that the owners of the capital should be rewarded for the use of it, by taking at different "convenient places," tolls on vessels and commodities passing along the river, so that the tolls should not exceed fifteen per cent. If the tolls for passing up and down the Cape Fear river, were to be demanded at a place near the falls of Roanoke river, (a distance of nearly one hundred and fifty miles from the Cape Fear river,) before they could be legally collected, the object and intention of the legislature in passiug the act of 1815,

would be frustrated. If we were to hold, that the demand was to be made at or near the Falls of Roanoke, and upon a refusal to pay there, that the vessel and goods should be distrained on the Cape Fear river, such a construction would at once be tantamount to a repeal of the law. This act of Assembly not being a penal act, but passed for a purpose highly beneficial to the country, must receive a fair and liberal interpretation. The tolls by the act are to be paid; and I think they may be demanded at some reasonable and convenient place near to the place, for the use of which, they became due. Would it not be monstrous to tell the debtors for tolls on the Cape Fear river, that they must go to the collector's office at or near the Falls of Roanoke, to pay them? I think it equally absurd to require the company to demand its debts due as tolls, from the captains of boats for using the Cape Fear river, at the Falls of the Roanoke, before a distress for them could be resorted to.

Where there is a saving clause in a statute, which is repugnant to the purview or enacting part of it, it is void. (1 *Co.* 47. *Plowd.* 564. 14 *Petersdorff's Ab.* 719, 720.)

The intention is to be collected from the express words of the particular clauses in each statute, and where the object and intention is clear, it is not to be defeated by the letter or wording of any particular clause, for every statute is to be expounded not according to the letter, but the intention of the makers of it. (*Curlen* v. *Chanklin* 3 *M & S.* 510. 14 *Petersdorff's Ab.* 716.)

It does not apppear from the case, that there is any such place as the Falls of Cape Fear river; the place of collection of the tolls due, must be at some reasonable and convenient place, and it does not appear that the place mentioned in the case, is an improper one.

If the demand of toll could be made at the place mentioned in the case, which I think it might, the next question made by the verdict is, "could the seisure be made on the day succeeding the day of the demand?" The answer to the question, appears to me, ought to be in the affirmative. I see no reason why the boat should not be distrained the next day, for a debt which she owed for tolls the

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day before, which had been then demanded and refused to be paid.

The next question is "could the seisure be made after the boat had arrived at the wharf?" By the eighth section of the act of 1812, the collector may refuse the passage of a boat, upon an omission to pay the tolls demand- but the section proceeds, that "if any vessel *shall pass* without paying the tolls, then the said collectors, respectively, may lawfully seise such boat or vessel." I think it a very convenient time and place for the collector to distrain when the boat came to the wharf; certainly it would be as legal to arrest the boat there, as in the stream. After reviewing the whole case, I think the judgment of the Superior Court should be reversed, and judgment entered for the State.

PER CURIAM.—JUDGMENT REVERSED.

MEMORANDA.

During the last session of the Legislature, THOMAS SETTLE, Esq. of Rockingham, was elected a Judge of the Superior Courts of Law and Equity, *vice* DAVID L. SWAIN, Esquire, elected Governor.

JOHN HALL, Esquire, on the 15th day of December, resigned his seat upon the Bench of the Supreme Court, and JOHN J. DANIEL, Esquire, of Halifax, one of the Judges of the Superior Courts of Law and Equity, was elected to the Supreme Court in his stead.

HENRY SEAWELL, Esquire, of Wake, was elected a Judge of the Superior Courts of Law and Equity, in the place of JOHN J. DANIEL, Esq. promoted to the Supreme Court.

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The State v. Isaac D. Lipsey.

Where a judge in his charge, did not repeat all the testimony, but only such parts of it as he thought would aid the jury in finding their verdict: It was held, (Daniel, J. *dissentiente,*) to be correct. And *per* Ruffin, J. and Henderson, C. J. that part of the act of 1796, (*Rev. c.* 452,) directing the conduct of judges in charging juries, which forbids a judge to express his opinion as to the weight of evidence, introduces a new rule. The other part, directing him to state to the jury the facts given in evidence, is declaratory that his discretion in hat respect, was not affected by the prohibitory clause.

The case of *The State* v. *Morris,* (3 *Hawks* 388,) approved and extended by Henderson, C. J. and Ruffin, J. and disapproved by Daniel, J.

Where, in the court below, a new trial was moved for because the judge expressed an opinion to the jury on the weight of evidence, and the case certified with the record, stated no instance in which this had been done, but that the judge was unconscious of having done so: It was held, that this court having no power to ascertain the fact, could not reverse the judgment.

Where on a trial for murder, the prisoner proved his general peaceable demeanor, and the judge informed the jury, that evidence of character was entitled to but little weight, where facts were positively sworn to, and it is doubtful from the case, whether this instruction referred to the fact of killing, or the amount of provocation, a new trial was granted, Ruffin, J. *dissentiente.*

This was an indictment for murder, tried before Strange, Judge, at Duplin, on the last circuit. The prisoner was convicted, and a motion for a new trial being overruled, and judgment of death pronounced, he appealed. The case certified with the record, stated "the following to be the grounds upon which the motion "was made:

1st. "That the jury had found against the weight of "testimony, only two witnesses testifying on the part "of the state, to a case of murder, and those two being "contradicted in material parts of their testimony by "three witnesses on the part of the state, and by all of "the defendant's witnesses who deposed to the same "part of the transaction.

2nd. "That the jury returned their verdict without "due reflection and proper deliberation, in a case where "there was confessedly a mass of conflicting testimony.

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3d. "That the judge expressed his opinion to the jury "on the facts of the case, or gave them so strong an in- "timation of it, that it was impossible for them to mis- "take it.

4th. "That the judge in reciting and commenting on "the testimony, dwelt at length, and directed the atten- "tion of the jury particularly to the parts of it, which "operated against the prisoner, and omitted to recapitu- "late or comment, on those operating in his favor.

5th. "That the judge erred in instructing the jury "that the character of the prisoner was only to be con- "sidered by them, where there was a doubt as to the "fact of killing, and was entitled to but little weight "where that fact was positively sworn to.

6th. "That in a case of conflicting and contradictory "testimony, the jury should have been instructed, that "if upon weighing the whole testimony, they had a ra- "tional doubt of the guilt of the prisoner, they ought to "acquit him.

7th. "That the judge misapprehended and misrecited "to the jury, a part of the testimony of *Hardy Newton*, "a most material witness for the prisoner.

"The two first grounds were overruled, the judge "approved the verdict, which was held to be sustained by "the evidence. The third ground was overruled, be- "cause the presiding judge was unconscious of having "said any thing in his charge to the jury, which invaded "their exclusive right, as judges of fact. As to the "fourth objection, the presiding judge did not recapitu- "late all, or nearly all, that was said by the witnesses "on either side, but selected from the mass of testimony "such facts as occurred to him to be important to a just de- "termination of the cause; and did not refuse to mention "any thing which was suggested by the prisoner's coun- "sel, but on the contrary, did mention several facts, and "commented upon them, at the suggestion of the priso- "ner's counsel, which he would not otherwise have "deemed necessary to call to the attention of the jury. "On the fifth point, the jury were instructed that the "character of the prisoner was only to be considered

"by them where his guilt was doubtful, and was entitled "to but little weight, where facts were positively sworn "to. On the sixth point, the jury were instructed, that "unless the prisoner's guilt was so fully proven as to "leave no doubt in their minds, they ought to acquit. "On the seventh, the presiding judge is not aware of "having misapprehended or mistaken the testimony of "*Hardy Newton*, or any other witness in the cause, ex- "cept one, which, upon the intimation of the counsel for "the prisoner, was corrected at the time, and if any "others had been pointed out, they would have been "corrected. It is further stated, at the request of the "counsel for the prisoner, that the testimony of the first "and most material witness for the state, was fully "recapitulated by the judge, and that of the other wit- "nesses was not recapitulated fully, but such parts "thereof presented, as in the opinion of the judge tended "to support or contradict the principal witness for the "state; that if the principal witness for the state and "others were believed, it was a case of murder, and if "the statement of some other witnesses was believed, it "was a case of manslaughter. And the jury were dis- "tinctly informed, that in this conflict of testimony they "must determine what they believed to be the real facts "of the case. Many witnesses were offered on both "sides, none of whom were implicated as unworthy, "from their characters, of credit. And the judge went "fully into the rules by which the credit of witnesses "was to be tested by the jury. It was in proof by all "the witnesses who testified to the fact, and they were "many, that the prisoner's demeanor, had hitherto, "through life, been perfectly pacific."

Mordecai, for the prisoner, contended,

1st. That the judge had erred in stating fully to the jury the testimony of the principal witness for the prosecution, and in presenting to them only such parts of the other testimony as corroborated or contradicted it; and it was urged, that this was stating the evidence for the state *in solido*, and amounted to an expression of his opinion

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upon the facts, and to this he cited *The State* v. *Moses*, (*ante* 2 *vol. p.* 463.)

2d. That the objection in the court below, that the judge had expressed his opinion to the jury, was not answered by the statement in the case, that the judge was unconscious of having said any thing in his charge which invaded their exclusive right as judges of the fact; that the case should have stated what the judge did say, and as this was not done, a new trial must be granted for want of a full statement of the facts occurring in the court below.

3d. That the act of 1796, (*Rev. c.* 452,) required the judge to state in a full and correct manner, the facts given in evidence, and it appeared from the case that this was not done.

4th. That the judge erred in instructing the jury, that the character of the accused was entitled to but little weight where the facts were positively sworn to, and was only to be considered where his guilt was doubtful; especially as the case stated it to be doubtful whether the prisoner was guilty of murder or manslaughter; and for this was cited *Rex* v. *Crawley*, (1 *McNally's Evi.* 322,) and *Rex* v. *Thelwall*, (*Ib.* 323.)

The *Attorney General, contra*, cited *The State* v. *Morris*, (3 *Hawks* 388.)

Daniel, Judge.—The third reason for a new trial, is, that that the judge expressed his opinion to the jury on the facts of the case, or gave them so strong an intimation of it, that it was impossible for them to mistake it. On this point, the judge states in the case, that he was unconscious of having said any thing in his charge which invaded the exclusive right of the jury to determine the facts. No particular expressions of this opinion by the judge, were pointed out by the counsel in the court below, and inserted in the draft of the reasons for a new trial, and thereby to get them incorporated in the case, or have a statement by the judge of what he did say to the jury. I cannot therefore, discover that he did

express his opinion to the jury on the facts of the case, and, on this ground, the motion must be overruled.

The fourth reason is, that the judge in reciting and commenting on the testimony, dwelt at length, and directed the attention of the jury particularly to those parts of it which operated against the prisoner, and omitted to recapitulate or comment on those operating in his favour. The case states, that "the presiding judge did not recapitulate all, or near all, that was said by the witnesses on either side, but selected from the mass of testimony such parts as occurred to him to be important to a just determination of the cause, and did not refuse to mention any thing which was suggested by the prisoner's counsel, as important; but did mention several facts, and comment on them, at the suggestion of the prisoner's counsel." The act of 1796, (*Rev. ch.* 452,) forbids a judge giving, in his charge to a petty jury, an opinion whether a fact is fully or sufficiently proved. But it declares it to be his duty to state in a full and correct manner, the facts given in evidence, and to declare and explain the law arising thereon. In the case of *The State* v. *Morris*, it was determined that a judge is not bound to notice the facts at all, but if he states any part of them, it becomes his duty to state the whole evidence; not in *hæc verba*, but as substantially as his recollection of them, aided by his notes, will enable him. The judge in the present case says, "he selected from the mass of testimony, such parts as appeared to him important, to a just determination of the cause." If the residue of the evidence was material to the issue, (if not material, it should not have been admitted,) he was bound by the enactment of the legislature, to state in a full and correct manner the whole of it, otherwise what he did state might have a tendency to obliterate from the minds of the jury, what was omitted, or leave an impression upon them, that in his opinion, the evidence not recapitulated, was worth nothing and did not deserve consideration. I think the judge erred in not stating the evidence fully; and therefore, for this reason, a new trial should be granted.

The fifth reason for a new trial, is, that the judge

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erred in instructing the jury, that the character of the accused was only to be considered by them, where there was a doubt of the fact of killing, and was entitled to but little weight where the fact was positively sworn to. The case states "the jury were instructed, that the character of the accused was only to be considered by them where his guilt was doubtful, and was entitled to but little weight where facts were positively sworn to;" again the case states, "that if the principal witness for the state, together with others, was believed, it was a case of murder; and if the statement of some other witnesses was believed, it was a case of manslaughter; and the jury were distinctly informed, that in this conflict of testimony, they must determine what they believed to be the real facts of the case; many witnesses were offered on both sides, none of whom were impeached as witnesses unworthy, from their characters, of credit." "It was in proof by all the witnesses who spoke of the fact, and they were many, that the prisoner's demeanor had hitherto, through life, been perfectly pacific." In criminal prosecutions, the prisoner is always permitted to call witnesses to speak of his general character, for it is general character alone, that can afford any test of good conduct, or raise a presumption that one, who had maintained a fair reputation down to a certain period, would not then begin to act an unworthy part, (2 *Russell* 703, 1 *McNally* 322.) If the judge, in his remarks relative to character, meant to apply them to a hypothetical case, or to state an abstract proposition, then he was right, for when the charge in the indictment is positively proven by credible witnesses, the general good character of the prisoner will have no weight in his favor—he must be convicted. But it appears, there were a class of witnesses in this case, who deposed to facts, which if found by a special verdict, would have authorised the court to pronounce the homicide to be a case of murder, and another class, who deposed to facts, which if thus found, would only have authorised the court to adjudge the prisoner guilty of manslaughter. In this conflict of testimony, the general good, or peaceable

character of the prisoner, would be a powerful auxiliary to support the latter class, by making out the proof of a provocation, to reduce the case to manslaughter. If, in a case of this kind, the judge was to tell the jury, that the general good character of the prisoner was entitled to but little weight where the facts were positively sworn to by the witnesses for the state, such a charge would not only be erroneous in point of law, but would be expressing an opinion as to the force and effect such a circumstance should have on the minds of those who were solely entrusted with the power of weighing the evidence, and judging whether it proved the fact of provocation, so as to reduce the homicide to a case of manslaughter. If I was to take the case from the reasons assigned by the counsel of the prisoner, it would be clear the judge erred; but I am to look at the case made up by the court, and in that I am not so well enabled to learn, how and to what the expressions, excepted to by the prisoner, were applied. They were words of supererogation, or they must be a part of the charge, relating to the evidence which bore upon the question of provocation, for that the deadly blow was given by the prisoner, was not disputed. The general good, or pacific character of the prisoner, was proper evidence to be left to the jury, and connected with the other evidence, was proper to enable them to ascertain the *quo animo* with which the act was perpetrated. I am left so much in doubt, by the case sent here, whether this portion of the charge related to the fact of killing, or to the question whether there was such a provocation given by the deceased as reduced the homicide to manslaughter, that I think it best a new trial should be granted.

HENDERSON, Chief-Justice.—I shall confine myself to what is called the fifth point on the motion for a new trial, which I shall take from the judge's response to the motion, and not from the allegation of the counsel. The judge asserts, that the jury were instructed, "that the character of the accused was only to be considered where his guilt was doubtful, and was *entitled to but little weight*

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where the facts were positively sworn to." Although I am opposed to prescribing rules of faith for the opinions of others, as we know so little of the ground on which our own are formed, that had this been a civil case, I do not know that I should disturb the verdict, as, without a very strained construction, the judge may be understood to have added the latter words, as illustrative of the former part of his charge, and it was so understood by the jury: Yet in a capital case, I cannot act upon bare probabilities, but must give to the words their *most* natural import, and view the latter part, to-wit, the following words: "and was entitled to but little weight where the facts were positively sworn to," as a distinct substantive instruction, which from its phraseology it purports to be. If the judge means by the words *positively sworn to*, clearly and satisfactorily established —he may be right, for character is thrown into the scale as presumptive evidence only, and if the opposing proofs are strong and clear, carrying conviction with them, in such case, it is quite evident that presumptions can make but little impression. But if he meant, as the words import, that the presumption arising from the character can have but little weight where the facts are positively sworn to *only*, or *because* the facts are positively sworn to, I think he erred, for the facts may be positively sworn and yet not afford such clear and satisfactory evidence of their existence, as not to be shaken by presumptive evidence. This may arise from a variety of causes. The character of the deposing witnesses—their means of knowledge—the manner in which they gave in their evidence—the very nature of the fact deposed to—the negative or positive evidence of opposing witnesses to the same or some other transaction referred to, conflicting with it. And indeed a great variety of causes may concur to shake the belief of juries in a fact positively sworn to, by one or many witnesses. Yet these of themselves may not be sufficient to overthrow the proofs. The weight of positive testimony yet inclines the scale against the prisoner, or to speak more properly, as character is admissible in criminal cases only, the weights in the

opposite scale are not sufficient to raise it from the ground, the character is then thrown into that scale, a rational doubt is raised, and the prisoner therefrom claims an acquittal. Let it not be said that this is an unnatural or an overdrawn picture. The original is of frequent occurrence, and I think I can perceive this case to be of that description. The judge in his statement says there was conflicting testimony: on the one side, the testimony of what he calls the main witness and others, made the homicide to be a case of murder, and some witnesses for the defendant, rendered it manslaughter. The peaceable and orderly character, which it was shown the prisoner had ever borne, had, I think, more "*than but little weight*," particularly as to the provocation, and the circumstances under which the mortal blow was given, for I presume that was the point on which the witnesses differed. Such a character, must have considerable influence where there was a doubt whether the blow was given upon little or no provocation, or whether the provocation was great.

These were my views in the case of the *State* v. *Merril*, (*ante* 2 *vol. p.* 269.) in which I delivered no opinion, but concurred with Judge HALL, in reversing the judgment. In that case, the prisoner's bad character ought not to have prejudiced him, as *he* did not offer his character in evidence, and it was *his* right to offer it or not. Who can say that it did not affect the verdict, that it did not make out a case otherwise defective, on the part of the state, or that the state offered it at least as a make weight. Could we, who are not permitted to weigh the evidence, say there was sufficient without it? The evidence which convinces the understanding, is composed of particles too minute, too subtle and too fluid, to be either counted weighed or measured; we have no weights or measures of it even for ourselves, much less have we weights and measures to mete it out to others. The only rule is the *quantum sufficit* to the understanding of him who is to decide. I then thought, and still think, it was the prisoner's right, (unless he waived it,) *to stand before his*

The case of the *State* v. *Merril*, (*ante* 2 *vol. p.* 269,) approved by HENDERSON, C. J.

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jury as an ordinary man, neither *above* nor *below* the common level, and he should not, but by his own consent, be placed otherwise; and that the jury only, (and perhaps not even they,) could say how much each particle of evidence operated, and affirm that the verdict was unaffected by the bad character of the defendant, improperly given in evidence by the state.

On the other parts of the charge, I concur with Judge Ruffin, and for the very satisfactory reasons given by him. I think that the judgment should be reversed, and a new trial granted.

Ruffin, Judge, *Dissentiente.*—Although this case goes back to a new trial upon one of the exceptions, yet, as some of the other points are of general consequence, and have received the deliberate consideration of the court, we feel it a duty to pronounce the opinions formed on the whole case.

The conduct of the judge is impeached upon both branches of the act of 1796, (*Rev. c.* 452.)

It is alleged, first, that he violated that statute by not stating in a full and correct manner to the jury, all the facts given in evidence.

The case stated in the record, contains an admission by the judge, that he did not recapitulate all, nor near all the testimony; that his method of summing up was by reciting fully the testimony of the principal witness for the state, and selecting such parts of the residue of the testimony, both on the part of the state and the prisoner, as he deemed important; and particularly, such portions of it, as in his opinion, tended to support or contradict that witness. The case further states, that at the request of the prisoner's counsel, the judge supplied some of the omissions in his charge, as first delivered, by mentioning and commenting on several facts, which he had not before thought it material to call to the attention of the jury; and that, although he did not then mention all the testimony, he did not refuse to do as to any part thus requested.

It is contended, that the act of 1796 is susceptible of a construction literal only; and thus construed, that it lays down an imperative and exact rule of duty, to be observed in every case.

That this argument is not correct to its whole extent, is established by the case referred to at the bar. (*The State* v. *Morris.*) That is an authority, that a judge is not bound to charge on the facts, that being a matter left to his discretion. The opinion adds indeed, that if the judge does charge the jury, he must do it according to the rule laid down in the act. That was not the point of the decision. If it were, it would be conclusive upon us now. And even as an incidental remark, falling from Chief-Justice TAYLOR, it is entitled to, and receives great respect. We do not however, concur in it; and I am persuaded, that had the point come directly into judgment, and thus called for those deliberate reflections of his mature mind, which he always bestowed on those questions, upon which the rights of parties were determined, we should now have the advantage of his authority for the conclusion at which we have arrived.

The powers and duties of a judge, in giving a charge at the common law, and the aid derived from it by the jury, were fully understood and clearly expressed by the Chief-Justice. And this duty, both in its performance at all, and in the manner of its performance, was felt by him to be discretionary. It depends of necessity, he says, on the circumstances of each case, whether the judge's aid would be of any efficacy. The evidence may be so equally balanced, that it would be unsafe for him to interfere; or the case may be so plain and intelligible, as to render his interference unnecessary. This necessity appears to us to be an equally good rule for the construction of the act, as for the principle adopted at common law. The rule being founded in necessity, has no limit or restriction, and in its nature can have none.—The great reliance indeed for truth in the verdict of a jury, is on the intelligence, integrity and independence of the jurors. But while they are deemed competent to that end, experience and the knowledge of mankind pro-

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duce the conviction, that, unused as they are to judicial enquiries, often depending upon artificial reasoning, they are more competent when aided by the more extensive knowledge and more perfect experience of a judge, versed in human affairs, accustomed to consider, discuss and digest masses of complicated evidence, to separate the material from the immaterial parts, and to combine the former so as to display the full force of each and all its parts. There is but little danger, that the complaint now made, can be justly urged against a judge—that he did not go fully into the evidence. Not only his usefulness, but his character much depends on it; and it is believed, that no judge ever refused upon the request of the jury, or even that of the party, where the purposes of justice could be in the least promoted by it. But the real point of controversy, often and generally depends on a very small portion of the testimony introduced. In the course of a trial, points made upon prolix and complicated documents, or after the most wearisome examination of witnesses, are abandoned, sometimes expressly, but oftener tacitly, because not sufficiently raised by the proof adduced, or answered by fuller proof on the other side. Counsel themselves, who have industry enough to discover, and sagacity to perceive the point really in dispute, do not feel their way through the cause in the dark, laying hold of every intervening object, material and immaterial, but bring that point to the light, establish its character, and press the evidence relevant to it; and in so doing, best serve the interests of the party and the purposes of justice. A burden which the counsel thus takes away from the court and jury, the judge cannot be bound to re-assume. To advert to every thing that has thus occurred during the trial, though not pressed by the party, though yielded by him, immaterial or absurd, would be a harmful consumption of time, obscure the truth, and confound the minds of the jurors. And it is not possible to lay down any rule, but one of two: either that it must be left to the sound discretion of the judge himself to determine where, and on what circumstances he will animadvert; or, that he must notice and

comment upon *all;* for who else can determine which was material or immaterial? Every body, who knows any thing of trials, knows that there are in every trial many details of testimony upon immaterial matters, and much impertinence of interrogatory and answer, which it can serve no purpose to sum up, and which in practice, are always disregarded. It is of necessity so.

The act of Assembly was not meant to alter the rule. It professes to be declaratory. It could not mean to declare that to be existing law, which all the world knew to be the contrary. The first clause does abridge an ancient duty of the judge, to advise the jury upon the weight of evidence, and restrain him from expressing an opinion, that a fact is sufficiently proved. But the charge was not confined to the weight of evidence, nor was that its most material part. In custom and utility, it extended to all the other important aids before mentioned, which the jury could receive from the judge. This the legislature knew and properly appreciated. The second clause was then added, not to create a new and substantive duty on the part of the judge, but solely to prevent such a construction of the first as should in any wise interfere, either in the way of enlarging or curtailing any of those functions usually exercised, or those duties usually performed, other than saying whether the proof of a fact was full or sufficient. Hence, this clause begins with "but," that is, notwithstanding the previous enactment, and continues, "it is hereby *declared to be*," that is, declared that it is, and shall continue to be, "the duty of the judge to state in a full and correct manner the facts given in evidence." If taken to be an enacting statute, enjoining positively a duty in the terms used, it is absurd; for it requires an impossibility. In giving a full and correct statement of the facts in evidence, there can, in this sense, be neither a more nor a less. In the whole circle of duties, to the performance of which a judge is called, there is not perhaps one, to the due performance of which, greater abilities and a happy temperament and elocution, are more necessary, than this of summing up to a jury. It often calls for the highest efforts of the

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most vigorous natural faculties, improved by education, informed in professional and general learning, practised in forensic debate and judicial investigation. It cannot be meant, that the least man should fully and correctly perform that to which only the greatest is equal. Coupling in the same sentence this duty with that of declaring the law arising upon the facts, does not put them both on the same footing in this respect. The subjects are distinct and of different natures. This last provision is strong to shew, that it was not intended to introduce a new rule in either respect; but to leave the obligations to sift and collate the evidence, and to decide the law, as they were before. It was before and always, the duty of the court to declare the law, and it needed no legislative authority to make it so. That in its nature is a definite thing. It may be done in direct terms by any body; and an error is subject to easy detection, and ready correction, by a superior tribunal. The act continues the duty as it then was. So with the other. It might be held otherwise, if it were possible to lay down any certain rule upon the subject. But the ground of the discretion at common law being indefinite, is that the duty is undefinable. The same reason controls the construction of the statute, even if it be considered as being an enacting one. The charge to the jury, therefore, must be left, as it always has been, to the discretion of the judge; the occasion to his conscience—the manner to his ability. The only exception is such a plain departure from impartiality in collating the evidence, as of itself to convey to the jury an impression of the judge's opinion as clearly as an explicit declaration would. If it were possible to make such a case appear, in its true light in the record brought here, this court would be bound to set aside the verdict.

This the majority of the court thinks to be the plain sense of the act, and should not have deemed this reading of it necessary, but for the *dictum* in the *State* v. *Morris*, and the zeal manifested at the bar in the argument of this case, and a difference of opinion amongst ourselves, which led us to suppose, that possibly we might before

have misapprehended it. We are now satisfied, that there is no medium between the rule of the common law and one which shall seal the mouth of the judge altogether; a measure, which will probably be thought of, when an appeal shall be allowed from the Superior to the County Court, and which would imply a reproach unmerited, I believe, as it is derogatory, to the intelligence and the virtue our fellow-citizens, who sit as jurors in the Superior Courts.

It is alleged next, that the judge violated the same statute by expressing his opinion upon the facts. If this be true, the verdict must be set aside.

The case stated in the record, does not set forth the words of the judge, which are complained of, as being an expression of opinion; nor does it set forth, that in fact the judge did express an opinion. On the contrary, the presiding judge overruled the motion for a new trial, because he was unconscious of having thus invaded the exclusive right of the jury. It does not then appear affirmatively, that the judge did err, as is alleged.

But it is insisted, that the case is so stated in this respect, as to preclude this court from examining into it, and therefore, there must be a new trial. The argument is, that the judge cannot say in general terms, that he did not express an opinion upon the facts, but must set forth the evidence and his comments on it; much less can he say he is not conscious of having done so; for the rights of the party depend upon the fact, and not upon the motives of the judge, or his inadequate perception of his duties or his errors.

It will be perceived, that this argument is not directed against the error which was alleged in the Superior Court to have been there committed by the judge, and from which this appeal is taken. It is not an error committed in deciding the cause, but in the method of stating that decision. Errors of the former kind, are those which it must be supposed an appellate tribunal is constituted primarily to correct. And it seems to the court, that our jurisdiction is necessarily confined to them. For we have no means, but the statement of the record,

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of ascertaining whether the case is truly or untruly, perfectly or imperfectly set out; and what we find there, we must say happened, and cannot say that any thing else did. It is argued, that as the judge states the case, or at all events, admits it, if drawn up by counsel, or such parts of it, to be inserted in the record as he chooses, that the case stated must purport to be a full statement, else the judge will have it in his power to keep all his errors from the revision of this court. This consequence is true, but the question is not what the judge of the Superior Court ought of his own motion to do, nor what provisions it would be wise in the legislature to adopt to compel him to do the party right; but what jurisdiction is by law conferred on this court—whether we can go out of the record for any purpose? Suppose a judge of the Superior Court, instead of stating the case partially, should refuse to state any, and refuse to allow an appeal, or the prayer for one, to be entered of record, could this court ascertain those facts, and give a remedy by reversing the judgment? Certainly not.

The objection assumes, that it is the province of the judge to put the exceptions down in writing, and set forth the facts on which it is founded, and not of the party who alleges the exception. I say this is assumed, because certainly he whose duty it is to draw up the case, cannot complain that it is imperfect. The duty of the judge to admit the truth to be stated, as far as the party thinks the same to be material to him is, doubtless, both an official and moral one. But that the labor of preparing it does by law or in reason devolve on him, is more than doubted. The only statute upon the subject is that of 1799. (*Rev. c.* 520.) That authorises the judge to make up *a case*, or to cause one to be made by the counsel in court, under the direction of the judge. No appeal is given by the act. The only questions brought up were those on which the judge or judges doubted, and they were sent to a conference for the satisfaction of the judge himself. He, therefore, as best knowing his own mind, might well be expected to put down the question which he wished resolved, and

that required neither much time nor labor, and consequently could not interrupt his other duties. But even then he might impose the task on the counsel of the parties. In practice, a difficulty has seldom, if ever, arisen. The judge or the counsel has drawn out the case according to their mutual convenience. Finding the system, as thus in use, to operate beneficially, the necessity did not occur to the legislature, when passing the acts of 1810 and 1818, allowing appeals, for providing by whom the party's exception should be written, or giving any means for compelling the judge to put the matter thus written, if true, upon the record. In the absence of legislative provisions, this court is obliged to decide upon reasons of propriety and general convenience, and place the duty on those to whom those reasons point. As a matter of personal labor, the party and not the judge, ought to perform it. But the public interests constitute a preponderating argument, which can leave no doubt. Appeals are now, as they ought to be, matters of right. Imposing it on the judge as his business to prepare the cases, will put it in the power of one perverse suitor or capricious counsel, to arrest all other business, and engross the judge during the term, in drawing up reports in perhaps the first or second cause called for trial. If it then be also true, that the record as drawn up by the judge must set out the whole case, the evils would be intolerable; for although every exception might not make that necessary, yet in every case it would be in the power of the party to make the exception now under consideration, that the judge had expressed an opinion, and then the judge must write out all the evidence, and all his charge, or state falsely, that he had set them down, when he had not. The judge would be harassed at the will of the person against whom he had decided, and this only at the poor risk of paying costs in this court; other suitors would be indefinitely delayed; and the records would be unnecessarily, but unavoidably prolix. It is enough to require the judge to admit the party's statement to record, if true, and to reject it if not true. And the party cannot object to the statement, because it must be taken in

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this court, to be his own—prepared by him or for him. Even if it appear to be the personal act of the judge, it must be presumed to have been satisfactory to the party, (under the provisions of our law,) or that he would have framed another, which, if true, the judge would have adopted. And in this case, that presumption seems to be consistent with the fact, for the objection in the Superior Court was made in terms as general as possible, without any specification, and has been sufficiently met by a denial in terms as general.

There are perhaps considerations applicable more directly to the question as to the responsibility of the judge. For admitting that the duty be on the judge, and that he perform it imperfectly, the question remains, can this court reverse the judgment, when no error appears, and this much only is seen, namely, that for all that does appear, there may have been an error in the decision. The appeals first known in this state at common law, were those on which a trial *de novo*, was to be had. The first verdict was abrogated, the merits stood indifferent; the appellate court was to try and determine the cause upon the whole case as there made, without reference to what it was in the court below. Appeals had so long and familiarly been regarded in this light, that it is not surprising, that upon appeals being first allowed to the Supreme Court, the difference was not attentively considered. Early after this court was organised, new trials were ordered, because the case was not stated, or not sufficiently stated. But in others, as in *Frazier* v. *Felton*, (3 *Hawks* 231,) the contrary was held. And more recently in several cases, an appeal has been treated as being in the nature of a writ of error, operating as a *supersedeas* to the judgment below, and the case in the nature of a bill of exceptions. The verdict, and in some respects, the judgment are not annulled. If erroneous, the latter has to be reversed here, and the former set aside. The merits do not stand indifferent. It is a fair presumption, that the instructions in matter of law were right. And every presumption is made in favor at least of a verdict, as determining the merits. These

presumptions must stand, until overthrown by facts distinctly appearing. In no country, I believe, in the world is it otherwise, where causes are not reheard, but barely reviewed—certainly not in any proceeding, with the assistance of a jury to determine facts. It is no answer to this reasoning to say that the party will be without remedy. This, by appeal, must be also proved to be the proper remedy. It may be, that there is redress for the party against the judge. That is not for us to determine at present. Certainly too, the judge is responsible in his character, and obnoxious to punishment as a public offender, who refuses to insert the facts on the record, or does it untruly to the prejudice of the party. The legislature seems to have thought these responsibilities a sufficient guarantee of fidelity, and as far as our experience has extended, the confidence was not misplaced. If they prove insufficient, the legislature alone can supply others. If indeed our present statutes had given to this court other means of getting the facts placed before it than by a statement *in the record*, the court could and would have founded a remedy on the statute, as has been done under that of 13 *Ed. I. c.* 31, by a rule and a *mandamus* to the judge to certify the facts. But our law requires the case to be *of record in the court below;* and the judge cannot alter that after his term. But were such proceedings in our power, this court could not reverse the judgment before the judge did certify; nor after that, upon facts contrary to those certified, or because the certificate did not appear to be full. If the inferior court were to withhold its decisions altogether from revision, the evil would hardly be greater than that of the superior travelling out of the record for a ground of decision. The discretion of such a tribunal, with no means for informing its discretion, would be intolerable tyranny; no verdicts would stand, nor any litigation be terminated.

Being confined to the statements in the record, the court must say that it does not appear that the judge did give an opinion on the facts, and therefore, that there is no error in this respect.

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Thus far, the majority of the court concurs in this opinion, and the reasons given for it. It remains now to consider another exception, on which there is a difference of opinion, and I have the misfortune to stand alone here.

Upon the effect of the evidence of character, I think the error of the judge, if any, was on the side of the prisoner. I take the judge to mean, and that he must have been understood to mean, by the words "positively sworn to," sworn to directly by witnesses believed by the jury. In that case, I think evidence of character has *no* weight. I conceive, character is a circumstance, which cannot repel the positive and affirmative statement of credible witnesses. In other words, that the character of the person cannot change or give color to the character of his acts, when these last are satisfactorily established.

The judge is more than supported, in terms, by respectable writers on evidence and crimes. Mr. *Archbold*, (*Crim. Pl.* 73,) lays it down, that "evidence of character can be of avail only in doubtful cases." Mr. *Starkie*, (*Evidence, Pt. I.* 35,) says, that "a presumption from good character is too remote to weigh against evidence which is in itself satisfactory, and ought never to have any weight except in doubtful cases." These writers only follow those who have treated the subject before them, and seem fully to sustain the judge in adopting the rule, at least to the extent he did. I think he is equally sustained by principle.

Although there is no certain test of truth to each individual but his own senses, yet when one is called on to determine, upon human testimony, how the truth is as to a particular fact, not the object of his own senses, he must proceed on that testimony as if it were the certain means of determining the enquiry. He must do so, not only because by the universal sense of mankind, (founded on a general experience that a disinterested person will, under the sanction of an oath, ordinarily depose to the truth,) such testimony has been held to be means adequate to the ascertainment of truth, but be-

cause it is the only means in our power. If the interests of society would allow the determination to be avoided, it would be different. Each person might then claim the evidence of his senses before he pronounced his opinion affirmatively, that the fact was the one way or the other. But our obligations to each other will not suffer us to evade a decision. The tribunals must act, and they are obliged to decide without that highest evidence, their senses. In coming to a decision, they must assume that the means by which the truth may be best attained by them—by which alone they have it in their power to attain it, are means positively sure and certain of determining the question of fact. When therefore, the testimony of a witness is affirmative, positive and direct, and it is not contradicted by the testimony of another witness, or the credit of the first witness is not impeached, there is no opening for doubt, unless we say, not only that there is no absolute certainty, but that we must act, or are at liberty to act, as if every thing were absolutely uncertain—which is inadmissible. There is in such a case nothing, in the sense of weighing the testimony, to be left to the tribunal—whether judge or jury—to whom it is addressed; for there is no other relation touching the same fact, with which to compare it—nothing to be put in the other scale. It must be taken as entirely true; because *the law* says, in admitting it, that such testimony under the sanction of an oath, is a *sufficient* test of truth; and if it be uncontradicted, it is a perfect test, being the only one.

When a collateral circumstance is offered to shake a conclusion thus established, it is manifest that it is irrelevant to that end, if it be not inconsistent with the conclusion; or at leat, if it stand indifferent, admitting the circumstance to exist, whether the conclusion be true or false.

Such a circumstance I conceive general character to be. I admit it to be absurd to say, that an honest man has committed a larceny. But the question is, whether such honesty is proved by a previous character for honesty, against direct proof of the very fact. It seems

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to me, that it has no tendency to repel the positive testimony, unless we say that it is as probable that one man with a good character will commit the crime of perjury, and is committing it, as that another man of like character, did commit the crime deposed to. This may be true in the abstract. But it is a principle upon which we cannot act. We are obliged to proceed on the contrary principle, or let all offences go unpunished, and all wrongs unredressed. Of all circumstances, that of character is the least satisfactory. It is extremely difficult to say, in the first place, what the character is. The estimation in which one is held by the world at large is not, like particular facts, capable of being certainly known. Still more difficult is it, if not impossible, to dive so deeply into the human heart, upon the most intimate acquaintance, throughout the longest period of intercourse, as to afford a reasonable certainty of gaining such a knowledge of the temper and disposition as would produce more than a faint inference, that there was not an original taint in principle, or such a latent infirmity of temper as might be surprised by sudden, though slight provocation, or such a secret love of wicked lucre, as could not withstand temptation and opportunity. Men constantly do things, which astonish those who knew them before; nay, the thought of which never, under different circumstances, entered their hearts; at the very imagination of which, they would, at other times, have been shocked. Such is our experience of the frailty of our nature. There can be nothing then in the evidence of the character of the accused, to *contradict* or *discredit* clear and direct testimony. It may be said then, that it is altogether irrelevant and ought to be rejected by the court as incompetent. So it ought, upon principle, in a clear case of affirmative evidence; for the presumption founded on it is remote in every case, and absolutely inadmissible against evidence otherwise plain and satisfactory. It always has been held so, as evidence of guilt. This could not be, if it were substantive evidence to establish the crime; but it would be admissible, as is every other circumstance tending to

the conclusion. Neither in a clear case of positive testimony, does it tend to establish innocence. The humanity of the law, admits it on behalf of the prisoner. But it cannot be laid down to a jury, that they have a right to make what use they choose of it. It would be wrong to be governed by it in any case in concluding guilt; it is therefore never admitted for that purpose. It is equally inconclusive, on the other side, in general; but in favor of life and character, it is admitted as a slight circumstance to operate where even slight circumstances will avail—in a case of doubt and uncertainty. It cannot, in itself, make a case of doubt and uncertainty. Therefore, as I said, it is in principle incompetent, except in a doubtful case, and the court ought to reject it in every other. And so the court would as upon other questions of competency, if the court could determine the question upon which its relevancy depends, namely, the doubts entertained by the jury upon the substantive evidence to the fact. It is an anomalous case, and the evil arising from the admission of evidence when it ought not to be admitted, is sought to be corrected by advice to the jury, as to the state of facts in which that circumstance may be properly used. That, I think, was done here. The evidence was proper here, because there was a conflict in the testimony to the fact. If, upon that, the jury doubted, they could call in aid of the prisoner his good character, as contributing to the presumption, that he did not perpetrate a murder. If they had no doubts as to which of the witnesses swore to the truth, as between themselves, character could not raise them. And that, it seems to me, is what the judge said.

I am therefore, opposed to a new trial upon either of the grounds.

PER CURIAM.—JUDGMENT REVERSED.

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WILLIAM WOODHOUSE, *et al.*

v.

ABNER WILLIAMS, *et al.*

Where to debt on a bond, for the payment of purchase money, the defendant pleaded performance, and offered in proof of his plea an acknowledgement of payment, and a release in a bill of sale: It was held, that as he had not pleaded the release specially, it was mere evidence, and the plaintiff was not estopped to prove the contrary.

This was an action of DEBT, upon a bond executed by the defendants, whereby they bound themselves to pay the plaintiffs $2,000, with a condition reciting, that there was a treaty for the purchase of a vessel by the defendant *Williams*, from the plaintiffs, and proceeding: "Now, if in addition to the sum of money which the "said *Abner Williams* hath already paid, he shall pay "to the plaintiffs such further sum as the repairs they, "the plaintiffs, have put upon said vessel, since she hath "been under repair, and shall receive from the plaintiffs "all such rigging, &c. as they may have prepared for "said vessel, at a fair cash price, then the obligation "to be void, &c."

This bond was dated April 25th, 1828.

Plea—Performance of the condition.

On the trial, at Camden, before SWAIN, Judge, on the last Spring Circuit, the defendant in support of his plea, offered a bill of sale for the same vessel as that mentioned in the bond, dated April 29th, 1828, whereby the plaintiffs sold the vessel to the defendant *Williams*, "for and "in consideration of the sum of $2,000, to them in hand "truly paid, at and before the sealing and delivery of "these presents by" the defendant *Williams*, "the re-"ceipt whereof we do hereby acknowledge, and there-"with are fully satisfied and contented, &c." To rebut this, the plaintiffs offered a letter of *Williams'* to them, dated April 30th, 1828, authorizing them to deliver the vessel to the bearer, and promising to pay their bills for sails, &c. according to the contract.

For the defendants it was objected, that this letter could not be received to contradict the estoppel upon the plaintiffs, contained in the deed for the vessel; but his Honor permitted the evidence to go to the jury, who returned a verdict for the plaintiffs and the defendants appealed.

Iredell, for the defendants, cited *Brocket* v. *Foscue*, (1 *Hawks* 64.)

No counsel appeared for the plaintiffs.

HENDERSON, Chief-Justice.—An estoppel is the conclusive ascertainment of a fact by the parties, so that it no longer can be controverted between them. It is not solely the result of the act of the parties themselves, but may be by the adjudication of a court appointed to try the fact. After an estoppel has thus arisen, if the existence of the fact, contrary to it, is averred by one of the parties, the other may shew it by pleading if it be not already apparent upon the record, and pray judgment if it shall be controverted. But if the party seeking the benefit of the estoppel will not rely on it, but will answer to the fact, and again put it in issue, the estoppel, when offered in evidence to the jury, looses its conclusive character, becomes mere evidence, and like all other evidence, may be repelled by opposite proof, and the jury may, upon the whole evidence, find the truth. This is the rule only in cases where the party relying upon it has had an opportunity of pleading it as an estoppel, and does not do so, but takes issue on the fact. Where he has no opportunity of pleading it as an estoppel, as in actions of ejectment and others, where the pleadings are general, there the estoppel retains its conclusive character, and the jury must find according to it. This is common learning and common sense; by departing from it, we are involved in many difficulties and absurdities. The most competent evidence is to be rejected, because the other party has first got before the jury something of a higher and more conclusive character, but which the jury have not passed upon, even as to its genuineness; and if this lesser evidence be received, the

He who relies upon an estoppel, must plead it specially, or the jury may find the truth.

But if from any cause, the estoppel cannot be pleaded, the jury are bound by it.

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jury are to be told first to pass upon the higher evidence, and if they find it to be genuine, then entirely to disregard the lesser; but if they should find it not to be genuine, then to turn their attention to this lesser evidence; and here we have it gravely contended, although the defendant has himself averred the fact, that he has *paid* the money for which this suit is brought, and has not relied on the acknowledgement of payment contained in the bill of sale, that the plaintiff shall not be permitted to read to the jury the defendant's own letter, requesting him to deliver to his agent the articles purchased, for the price of which, this suit is brought, and promising that he will pay him for them. That this letter, coming from the defendant, and therefore competent—upon the subject in dispute, and therefore relevant, shall have no weight with the jury in determining a fact which they are sworn to decide according to the evidence. If the defendant had chosen, perhaps he might have concluded the plaintiff from alleging that the debt was not paid; but he shall not avoid the risk of pleading the release as an estoppel, and yet have all the advantages of its conclusive character before the jury. It is like pleading and demurring, at the same time, to the whole declaration.

The case of *Brocket* v. *Foscue* (1 *Hawks* 64) explained and then approved.

We are aware, that this decision is at variance with the principles declared in the case of *Brocket* v. *Foscue*, as applied in that case, but with the principles themselves this decision does not interfere.—There, by an oversight, we did not take this view of their application, and we are indebted to our brother DANIEL for it in this case. We hope by adhering to the law in its simplicity, to avoid the perplexities so often encountered on the trial of causes, and that we shall seldom hear of objections to evidence the most competent and relevant, because the jury have something before them already, but which they have not yet decided on, of a more conclusive character. If the lesser evidence has been first offered, telling the jury to pass first on the higher evidence, before they even look at the lower, necessarily, in the deliberations of a

jury, leaves them to find one fact, before they turn their attention to another, and frequently one fact decides the cause, and is often so dependent on another, that it is unnecessary to examine the latter before the former is disposed of. But it is rather novel for the jury to have before them, at the same time, evidence of such different grades, that they must examine and dispose of one class, before they can look at another. This is requiring of them more than they can do; necessarily, they must take the whole evidence, upon one fact, into consideration, they cannot, if they would, do otherwise.

We wish again to repeat, that we do not consider this decision at all at variance with the case of *Brocket* v. *Foscue;* it affects only the application of the principles, in the state of the pleadings there, we think it was decided by the wrong forum. If the conclusiveness of the receipt and acquittance in the deed had been relied on, it should have been pleaded as an estoppel, this not having been done, but issue joined on the fact of payment, the deed was only evidence of that fact, and the jury should not have been concluded by it.

Per Curiam.—Judgment affirmed.

Henry Smith v. James Morgan.

A guaranty of "a note and judgment against A. and B." is satisfied by a joint note of both, upon which judgment has been entered against one.

Assumpsit, upon the following guaranty:

"I, *James Morgan*, assign the note and judgment "against *Henry* and *John Wilkes*, of the town and county "of Halifax, which was made payable to me for the "sum of $3,350, dated 15th February, 1823, to *Henry* "*Smith*, and I, the said *James Morgan*, do guarantee "unto the said *Smith* that the aforesaid note and judg- "ment is good. March 4th, 1823."

Plea—*Non assumpsit.* On the trial, before Daniel, Judge, at Northampton, on the last Spring Circuit, the

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case was as follows: At the time of making the guaranty, *Henry Wilkes* had confessed a judgment to the defendant, but *John Wilkes* was not a party to it; *John Wilkes* was then perfectly solvent, and had a suit been brought against him then, or at any time before his death, in December, 1823, the debt mentioned in the guaranty would have been paid. Had an execution then issued to the counties of Bertie and Martin, against *Henry Wilkes*, it would have been satisfied, as he had property in those counties. Suit was not brought against *John Wilkes* until eleven months after the qualification of his administrator; it was brought in the name of the defendant, but whether it was prosecuted by him or the plaintiff, did not appear; within ten days after the date of the guaranty, the attorney who obtained the judgment against *Henry Wilkes*, asked the plaintiff if he wished process to be issued against *John Wilkes*, but was informed that his, the plaintiff's own attorney, would attend to the business for him.

The agent of the plaintiff, deposed, that learning there was no probability of having an execution in the hands of the sheriff of Halifax satisfied out of the property of *Henry Wilkes*, he had given the defendant notice of it, and that the plaintiff looked to him upon the guaranty; that upon receiving this notice, the defendant promised to attend to the collection of the debt, and threatened to make the money out of the sheriff, who he said had subjected himself; whether this notice and conversation took place in November, 1823, or February, 1824, did not distinctly appear.

For the plaintiff, it was contended, that the defendant in his guaranty had stipulated that there was a judgment against *Henry* and *John Wilkes*, and that as it turned out that there was a judgment against *Henry* only, this was not a compliance with its terms. But the judge ruled otherwise. The counsel for the plaintiff in his address to the jury, contended, that if the conversation deposed to by the plaintiff's agent, took place in November, 1823, before the plaintiff had been guilty of neglect in collecting the debt, it amounted in law, to an agreement on the

part of the defendant, to attend to the collection of the debt himself, and discharged the plaintiff from all obligation to take any further steps for that purpose; that if it took place in February, 1824, the counsel admitted the plaintiff then to have been in default, but contended, that if the defendant at that time, was fully acquainted with all the facts touching the state of the debt, and the steps taken for its collection, his undertaking amounted to a waiver of any advantage by reason of the laches of the plaintiff; and for this, the counsel referred the jury to his Honor.

The judge charged the jury, that if the defendant had promised to pay the debt, with a full knowledge of the circumstances, he was bound by that promise, and could not object to the neglect of the plaintiff; but if he only agreed to assist the plaintiff in the collection of the debt, the latter was not thereby discharged from his obligation to use reasonable diligence in prosecuting the claim against the principal debtors, and that if he failed in using such diligence, he could not recover in this action.

A verdict was returned for the defendant, and the plaintiff appealed.

Gaston and *Badger*, for the plaintiff.

Hogg, contra.

HENDERSON, Chief-Justice.—The matter assigned as the first breach, if there be any thing in it, goes to vacate and annul the contract, and is not within the stipulation of the guaranty, that the debt was good.—But the words "note and judgment" are a mere description of the thing sold, and no part of the guaranty, and are not false in fact; for there could not be a note and judgment, against both *Henry* and *John Wilkes*, for the same debt, at the same time; and especially if the note on which the judgment is obtained, precede the judgment, for in such case the note is merged in the judgment. The description imports just such a thing as there is, viz: in a joint note taken against both, reduced to a judgment against one. But if it was a false description, and thereby the contract was vacated, and even if

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a count annulling a contract could be joined with one enforcing the same contract; yet the plaintiff, by receiving the thing with a full knowledge of what it was, and retaining it so long, admits that it was in substance the thing purchased, and waives his right of vacating the agreement.

As little ground is there to support the objection taken to the charge of the judge below; although it is admitted that the charge did not meet the view of the plaintiff's counsel, and although if the evidence made the point, either by positive proof, or by an inference which the jury could draw, the judge should have declared the law upon it. I allude to the reference made by the counsel of the plaintiff, in his address to the jury, to the judge, as a matter of law, for him to decide, that if the conversation (with the agent) took place before *Smith* had been guilty of neglect, it amounted in law to an agreement on the part of *Morgan* to attend to the collection of the debt out of *Wilkes*, and discharged *Smith* from taking further steps in relation thereto. I do not know that I catch the counsel's idea, but take it either way, it cannot benefit the plaintiff. In the first place, there is nothing like the sole undertaking of its collection by *Morgan*. This engagement amounted to nothing more, than that he would give his aid, and by consequence did not discharge *Smith*. Now if the collection of the debt was of such a nature, that two could not act in it, that the aid of one necessarily prevented the other from acting at all—if there be such a state of things; then, if *Morgan* undertook to act, or even to aid, and if this necessarily prevented *Smith* from acting, surely the agreement by *Morgan*, to attend to, to aid, or assist in the collection of the debt, necessarily discharged *Smith*:—discharged him I say, if necessarily the aid in attending to the debt prevented, that is, rendered it impossible for *Smith* to act in the matter. But I cannot see how it rendered it impracticable for *Smith* to act also. As a question of law, I should therefore say, that if before *Smith* had been negligent, *Morgan* had promised to attend to the collection of the debt, that *Smith*

An undertaking by the guarantee to assist in the collection of a debt he is bound for, does not justify laches in the party guaranteed.

was not thereby discharged, unless *Morgan* by words discharged him; his agreement to attend to it, did not have that operation, unless he had taken upon himself the exclusive collection of it. As to the express promise, the judge ruled that a promise of any kind, either expressed or implied, would bind *Morgan*, if made with a full knowledge that *Smith* had by his negligence discharged him. The charge was certainly as favorable to the plaintiff, as the law warranted; nor do I perceive any impropriety in the judge's pointing out the difference between a promise to pay, and a promise to assist in the collection of the debt. Taking the conversation to be either before *Smith's* neglect, or after, then he can claim nothing from it either in law or fact. If before, it did not amount to any thing like a discharge to *Smith* from further diligence:—if, after there was nothing in it like a promise, so far from it, that if the jury had found for the plaintiff on that ground, the judge ought to have set aside the verdict as being against the evidence. The fact is, the sum is large, and the plaintiff when he brought this suit calculated on the chances. It is a most groundless claim.

PER CURIAM.—JUDGMENT AFFIRMED.

RHODA WALLER v. JOHN MILLS.

Where a father in pursuance of a family arrangement, conveyed part of his property to a daughter, and the residue to a son, upon condition the latter should pay his debts, the son is bound as a party to the deed to the daughter, although it is void as to the creditors of the father; and if the son takes an assignment of a judgment against the father, and buys the property of the daughter under it, he acquires no title.

TROVER, for a slave. *Plea*—Not guilty—and on the trial, at Lenoir, before MARTIN, Judge, on the last Spring Circuit, the case was as follows:

John Waller, the father of the plaintiff, in November, 1826, conveyed the slaves in dispute, to the plaintiff by

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a bill of sale, reciting a consideration of $260; at that time, *Waller*, the father, owed debts to the amount of $1700; besides the slaves conveyed to the plaintiff, he then owned land worth $750, and other slaves worth more than $900, and some debts due him, and chattel property of value.

At the date of the bill of sale to the plaintiff, he conveyed a small slave, not one of the two above mentioned, to another daughter; to whom and to the plaintiff, he also conveyed his land; at the same time, he conveyed all the rest of his property to a son-in-law, one *Bradham*, upon condition, that he, *Bradham*, would pay all his debts. Some time in the year 1827, *Bradham*, having in his possession judgments and executions in favor of several different persons, against *Waller*, the father, placed them in the hands of a constable, and directed him to satisfy them out of the property which had belonged to *Waller*. Under these executions, and another in favor of one *Jones*, the slave in dispute, together with the one conveyed to the sister of the plaintiff, and also several horses, &c. were advertised for sale. At the sale, but before it commenced, *Bradham* purchased *Jones'* judgment and execution, and thus becoming entitled to receive all the money to be raised, he instructed the officer to sell for *specie* only, and purchased all the property sold at an under value, and took a bill of sale for the slaves conveyed to his sisters-in-law. These slaves were left by *Bradham*, in the custody of the plaintiff and her sister, until the month of April, 1828, when they were seized by the defendant, by *Bradham's* directions, under an execution against the latter.

The defendant offered *Bradham* as a witness, but he was rejected as incompetent. He then offered to prove, by common reputation, that *Waller*, the father, who died in 1831, was insolvent at that time, but his Honor rejected the evidence as irrelevant.

The judge charged the jury, that although the bill of sale to the defendant, might be fraudulent and void as to the creditors of her father, yet that it was valid to pass the title of the slave in dispute, to the plaintiff

against all other persons; that they should enquire whether the title of the plaintiff was ever divested by a sale legally made, at the instance of a creditor of the father; that as to the sale under the judgments and executions which had been assigned to *Bradham*, they ought to ascertain whether those executions were for debts of the father, which *Bradham* was bound to pay; if they were, and that sale was made for the benefit of *Bradham*, and for the purpose of fraudulently defeating, for his profit, the title of the plaintiff, they ought to find for her.

A verdict was returned for the plaintiff, and the defendant appealed.

J. H. Bryan and *Mordecai*, for the plaintiff, as to the competency of *Bradham*, cited *Purviance* v. *Dryden*, (3 *Serg. & Rawle* 402.) *Alderman* v. *Tirrell*, (8 *John. Rep.* 418.) *Stockham* v. *Jones*, (10 *Ib.* 21.) *Nix* v. *Cutting*, (4 *Taunt.* 18.) They urged that the conveyances by the father were fraudulent in law, if he was insolvent, evidence of which was proper, and they cited *State* v. *Cochran*, (*ante* 2 *vol. p.* 63.)

Gaston, contra.

In an action against a constable for wrongfully seizing goods of A. under an execution against B. the latter is not a competent witness to prove title to them in himself.

RUFFIN, Judge.—The case of *Bland* v. *Ansley*, (2 *Bos. & Pul. New Reps.* 331,) establishes the incompetency of *Bradham* upon a clear principle. The slave had been seised by the defendant under a *fi. fa.* as the goods of the witness, and he is offered to prove property in himself. He has a direct interest in the event; for, if successful, he pays his own judgment debt. And our statute which makes the defendant in execution liable to the purchaser, if the latter be evicted by a paramount claimant, renders the reason for excluding the witness stronger here, than it is in England.

It is unnecessary to discuss the questions, whether the conveyance to the plaintiff was fraudulent in law; and whether, by consequence, the evidence of the father's insolvency in 1831, ought not to have been received. The judge assumed, that the deed was void as against credi-

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tors generally; but admitting it to be so, he held, and we think properly, that it was valid as against *Bradham*, supposing the debt, for which the negro was sold, to have been then contracted. At the sale under execution, *Bradham* owned that debt: and if it existed when the deed was made to the plaintiff, he was, by his contract with old *Waller*, to pay it. For the purposes of this controversy, that debt must be considered as satisfied. *Bradham* cannot hold the estates conveyed to him, and yet go against the residue of the father's property for the very money which constituted the consideration of the conveyance to himself. The only question remaining, was one of fact, whether the debt to *Jones* existed at the time of the contract between *Waller* and *Bradham*, and so was one of those to be paid by the latter. That was left to the jury, and found affirmatively. If so found without sufficient evidence, the Superior Court might have granted a new trial. We cannot. But it is said, there was no evidence; and therefore the court erred in leaving it to the jury at all. If such were the fact, it would be error in a case where the *onus probandi* was on the side of the plaintiff. But we cannot take that to be the fact. It is not to be presumed, that the judge would go out of the case made, and deal in mere abstract propositions. The record does not contain any objection in the Superior Court, on this ground; and it was therefore unnecessary to state the evidence relative to it.

I have no doubt, however, that the debt existed in November, 18x6; and think it extremely probable, that all the deeds then made to *Bradham* and the daughters, were fraudulent against *Jones*, and *Waller's* other creditors. It was a family arrangement in the nature of a voluntary settlement of all, or nearly all, the father's property; and this, I say, notwithstanding the price agreed to be paid by *Bradham* for what was then conveyed to him. If that price were the full value, yet his embarrassments, which plainly appear, shew his responsibility to be an inadequate security to the creditors. A debtor cannot substitute for the solid value of his pro-

A settlement whereby the property of a father is vested in a son, and the latter charged with the debts of the former is void as to creditors.

derty, the colorable provision of an insolvent's engagement to pay the debts. The presumption is very strong, that the object of the sale under execution, was to supply this defect, and that in this object all the parties concurred. The debt was in the name of *Jones*, who had a right to treat the deeds as nullities; *specie* was demanded, to keep off other bidders; *Bradham* purchased, but, instead of taking the property, left it still with his sisters-in-law. It can hardly be doubted, that *Bradham* and the plaintiff then understood each other; and that the design was, not to deprive her of the negro, but to confirm her title—she trusting to *Bradham* not to use his legal title to her prejudice—*Bradham* seems to have kept his faith until April of the next year; and then he and the present defendant commenced that course of conduct, which produced the present action. If such was the true state of facts, and *Bradham* was the owner of *Jones'* judgment, it is manifest that the last sale was but a continuation of the first fraud; and a court of justice can, in such case, help neither party. The law leaves them where they place themselves. Had the defence been put on that point, and the jury drawn the same inferences of fact from the circumstances which I do, the plaintiff would have been barred; because she participated throughout, in each act of fraud. But the jury was not required to make such inferences, nor the court asked to instruct them upon their effect, if drawn. This court cannot, therefore, act on this part of the case; because we cannot say how it was, or might have been answered, by evidence from the other side, if it had been relied on. Indeed, the point would not have been adverted to at all in this opinion, except for the wish not to be misunderstood. This construction of the acts of the parties, seems to us to be so obvious, as to induce the belief that it will be deemed the natural one by all other persons; and if no notice had been taken of it, it might be supposed the court meant to approve and support such dealings. But the decision steers clear of the point, which is not open to this court.

Neither party to a fraudulent conveyance can be aided by a court of justice.

Points which were not made on the trial, and if taken might then have been disposed of, will not be examined on appeal.

Per Curiam.—Judgment affirmed.

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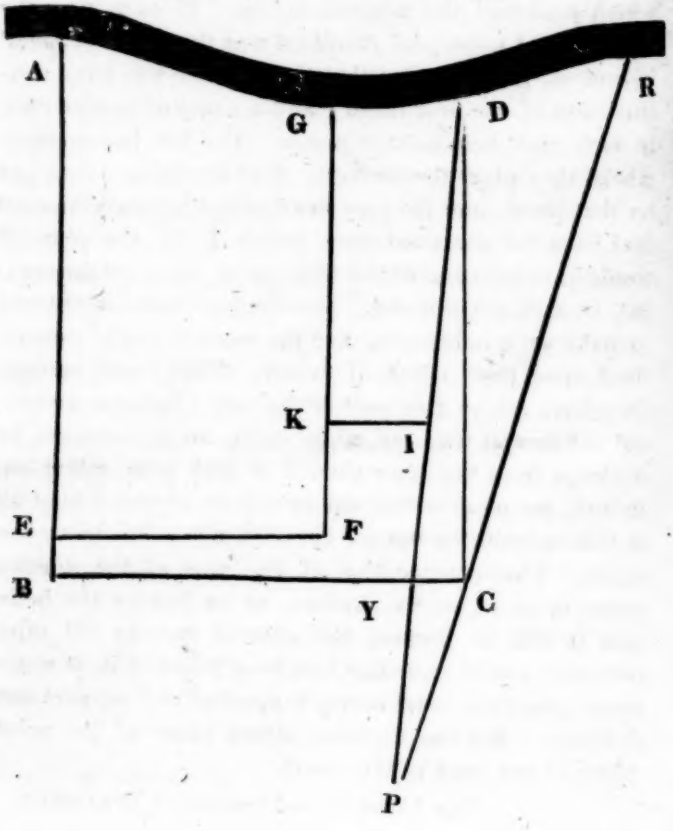
DEN *ex dem.* DENNIS INGRAM *v.* THOS. COLSON, *et al.*

Where the parties to a deed intended to convey only land, to which the vendor had title, and also that it should set out the boundaries of the grant to him—but the land was especially surveyed and corners marked, and the deed made according to the survey, its courses are not to be controlled by those of the grant, and if it covers more land than the grant, it is color of title as to the excess.

A question of boundary discussed by HENDERSON, C. J.

EJECTMENT, tried on the last circuit, at Anson, before DANIEL, Judge.

The plaintiff claimed under a grant to his lessor, made in the year 1823, which covered the land in dispute.—The boundaries of this grant are represented in the diagram by the lines D. I. K. G.



The defendants contended, that the land covered by the grant to *Ingram*, was included within the boundaries of a grant to one *John Clarke*, dated in 1746, and that if it was not, that they, and those under whom they claimed, had been twenty-one years in possession of it, under known and visible boundaries, with a color of title, and were protected by the act of 1791, (*Rev. c.* 346,) for limiting the claim of the state.

The land granted to *Clarke*, was bounded as follows: Beginning at a locust on the south bank of the river, running south 30 degrees west 160 poles to a pine; thence south 60 degrees east 190 poles, to a gum; thence north 30 degrees east 184 poles to a red oak, on the bank of the river; thence to the beginning. The locust was admitted to have stood at point A. in the diagram; the courses and distances of the boundaries are from A. to E. F. and G. upon the diagram. It was proved that a red oak, marked as a corner, formerly stood at G. and was an old tree.

For the plaintiff it was contended, that the grant to *Clarke* should be confined to the lines A. E. F. and G. being the courses and distances of its boundaries. On the other side it was urged, that its boundaries were A. B. C. and D. A pine marked as a corner, stood at B. which was about 80 yards over the distance mentioned in the grant, viz: 160 poles; the mark upon the pine was made many years after the date of the grant to *Clarke*. At Y. there was a gum marked as a corner, but much younger than the grant to *Clarke*. At D. there was a white oak and a red oak marked as corners, one sixty-eight, and the other forty-six years before the survey. In 1765, *Clarke* conveyed the land granted to him to one *Walker*, describing it exactly as it was described in his grant. *Walker* conveyed to *Colson*, the ancestor of the defendant, but before the deed was executed, a surveyor run off the land beginning at A. and running thence to B. C. and D.; the deed from *Walker* to *Colson* described the land exactly as it was in *Clarke's* grant, except at D. it called for an oak on the river, instead of a red oak on the river. The white oak at D. is the beginning of

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a grant which issued to one *Stephens*, in 1766, which is represented by the lines D. P. and R. From D. to P. line trees were found corresponding in their ages, to that of this grant. In that patent, the white oak, its beginning, is said to be *Walker's* lower corner, and was thus described in several mesne conveyances, which were set out in the case. It was proved, that the pine at B. the gum at Y. and the white oak at D. had been called and known as *Walker's* and *Colson's* corners, for more than twenty-one years before the grant to the lessor of the plaintiff; and further, that the defendants, or those under whom they claimed, had been in possession for more than twenty-one years before the same period.

His Honor charged the jury, that if they thought the pine at B. and the oak at D. were the corner trees called for in *Clarke's* grant, the courses and distances mentioned in the grant would be controlled by the proof of the corners, and the grant would extend to them; but if they should find that those trees never were intended to be the corners of that grant, or if the corners were unknown, then they must determine its boundaries by its courses and distances, until they came to the third line, where the river was called for, and that being a certain termination of the third line, it must be extended to the river; that if the marks were too young, or the other evidence did not justify them in finding that either the lines C. D. or Y. D. was the third line called for in the grant, and they should be driven to the courses and distances to locate the grant to *Clarke*, they must then adopt the lines A. E. F. G. in which event, the land granted to the lessor of the plaintiff would not be within the boundaries of that grant. That if they thought the line F. G. to be the third line of *Clarke's* grant, another question arose, viz: whether the defendants or those under whom they claimed, had been twenty one years in possession of the land in dispute under known boundaries, and with a color of title; that the act of 1791 (*Rev.* c. 346.) required three things to bar the state, or those claiming under it, viz: twenty-one years possession,

known and visible boundaries, and a color of title; that if the jury believed the evidence, the defendants possession had been for more than twenty-one years, and the marked pine at B. the gum at Y. and the white oak at D. were visible boundaries of that possession, within the meaning of the legislature. That the defendants contended the deed from *Walker* to *Colson*, was a color of title as it was urged that it extended to the lines Y. D. or C. D. and that the description of the boundary in the deed was different from that in the grant, as one called for an oak, and the other for a red oak; and further, because it was proved that upon the purchase of *Colson* from *Walker*, the lines were actually run to the white oak at D. and it was then marked as a corner. His Honor left it to the jury to say, whether the description in the deed and the grant, were so different as to vary the boundaries of the first, from those of the last, and whether the variance was so great as to make the deed cover land which the grant did not, informing them that it was color of title to all land it covered; that if they believed the boundaries of the deed from *Walker* to *Colson* were the same as those of the grant to *Clarke*, and if the latter extended no further than the line F. G. in the diagram, then there would be no color of title beyond that line. That the plaintiff was entitled to recover unless the grant or deed covered all the land between the lines D. I. I. K. K. G. and the river, although the defendants might have had a continued possession of all that land under known boundaries.

The jury returned a verdict for the plaintiff, and upon a motion for a new trial the judge observed, that it was contended, that the deed from *Walker* to *Colson* was color of title for all the land within the boundaries surveyed before its execution, which were the lines A. B. C. and D. but that he thought it a question for the jury, whether the boundaries of the deed were intended to be the pine at B. and the white oak at D. if they were, it was color of title up to those points, but if it was intended only to follow the boundaries of the grant, if the latter fell short of the point D. color

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of title under the deed also would. A new trial was refused, and the defendants appealed.

No counsel appeared for the defendant.

Mendenhall, for the plaintiff, cited *Smith* v. *Murphey*, (*Taylor's Rep.* 303.) *Person* v. *Rountree*, (1 *Hay.* 378.) *Standen* v. *Bains*, (*Ib.* 238.) *Bradford* v. *Hill*, (*Ib.* 22.) *Fruit* v. *Brower*, (2 *Hawks* 337.) *Slade* v. *Green*, (*Ib.* 218.) *Tatum* v. *Sawyer*, (*Ib.* 227.) *Tate* v. *Southard*, (3 *Ib.* 119.)

Henderson, Chief-Justice.—Upon the third point in the case, the color of title, the judge after having disposed of the actual title, and limiting it to the boundaries of *Clarke's* grant, and after pointing out a difference in the calls of the grant and those of *Walker's* deed to *Colson*, the first calling for a *red* oak, and the latter for an oak only, at the termination of the third line, informed the jury that they must consider whether the descriptions were so different as to vary the boundaries of the deed from those of the grant, and whether the deed covered all, or any of the land in dispute, if it did, it was color of title for so much and no more; that if they should be of opinion, that the boundaries of the land described in *Clarke's* grant went no farther than the line F. G. and if they should think that the boundaries of the deed from *Walker* to *Colson* were the same as the boundaries set out in the grant, then there would be no color of title. If there could be any doubt of what the judge intended to say, and in fact of what he did say, it is rendered certain by his remarks on the motion for a new trial. The jury, he then observed, were to determine whether the boundaries of the deed were intended to be the pine at B. and the white oak at D. if they were, it was color of title; but if it meant to convey only the land described in the grant, and the grant stopped short of D. then would color of title under the deed stop where the grant stopped. By this, I understand the judge to mean, if the calls of the grant and the calls of the deed were the same, (upon paper, upon their faces,) and there was nothing to control the courses and distances of the grant, that is, nothing to designate the pine, the gum, and oak

called for in it, so that we must resort to course and distance to locate it; its location was also the location of the deed. In this I think the judge committed an error, for although the parties might have thought, and no doubt did think, that they were surveying the lands granted to *Clarke*, and that his grant covered all the lands described in the deed; yet it is what the parties *actually did*, and not what *they thought* they did, (in this particular,) that we are to act on. Suppose in this case, it was proven, that the pine was marked at B. and the oak at D. as the pine and oak called for in the deed; could it be said that these were not the actual boundaries of the deed, because the parties thought that they were also the boundaries of the patent—would this displace the trees and obliterate the marks, and cause them not to be the bounds described by, and called for in the deed? It is true, title passed no farther than the patent extended, because beyond that, the vendor had none, but still the pine and oak would be the *termini* of the deed, because they were the objects called for by it. The judge was mistaken in supposing, that because these were also the calls of the grant, and there being nothing to shew that they were the trees called for in it, and of course that the grant could not be extended to them; so neither could the deed, because the parties thought that the lands conveyed by the deeds were the same with those covered by the grant. The jury should have been informed, that if they believed the pine at B. the gum at Y. and the oak at D. were called for in either of the mesne deeds, that those trees were the boundaries of the deeds, and to them they should extend. I have no doubt but the evidence proved this; for although the facts are evidently stated, as applying to the boundaries of the grant only, yet, enough appears to show that the deed from *Walker* to *Colson* should go to B. C. and D.; not because the grant calls for a *red* oak, and the deed for an *oak* only, but because it is shewn they were marked when the survey of the land was made, preparatory to the execution of the deed. I say marked, not only because the witnesses swear that they were then marked, but because the marks

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now found upon them, (except the gum, which is not found at C.) corresponds in age, with the date of the deed, and with the reputation of the neighborhood, that they are the bounds of *Walker's* and *Colson's* lands. The calls of coterminary grants and deeds, for a great number of years, also prove the white oak at D. to be *Walker's* lower corner. This appears, although it is evident that the case was made to locate the patent, and not the deed, as the age of the marks upon the pine is not stated, nor the date of the deed from *Walker* to *Colson;* it is only said that the marks on the pine were too young for the patent. We learn from an incidental remark of the judge, that the marks on the pine correspond in age, with the date of *Colson's* deed. From this, I think it probable that the pine at B. and the oak at D. are the trees called for in the deed, and if so, what is there to control that description; not the course and distance, because they are less certain than marked trees; not the patent, I think, for they were thought to be also boundaries of the patent; and if they are not, or rather are not shown to be, will that obliterate their marks and make them other than what the deed makes them, when proven to be the objects called for as its boundaries? Do they lose their identity, because another description is also given, which turns out to be a false one, or incapable of being shown? It is true, that when a thing is called for as having two identities or distinguishing marks, both capable of being ascertained, if they exist, as an oak with two chops upon it, and an oak with only one chop upon it is produced as the thing described, it is plain that this is not the oak called for, as that has two chops, and that shown has but one. But the description here, is a pine, a gum and an oak, and the grant is not even mentioned. But suppose the deed had described them as the trees described in the grant; it only negatively appears, that they are not the trees called for in the latter. But suppose, it was positively proved, that they were *not*, which in this case could only satisfactorily appear by showing others. Here there are two descriptions, which create an ambiguity, for there is none upon the

fact of the deed. Which shall we take? The answer, by Lord *Bacon*, is, that which is best supported by proof. A thing dehors the deed is shown by parol, it is a latent ambiguity, and shall be explained by parol. I have supposed two things, neither of which exist in this case; first, that the deed describes the trees as also the boundaries of the grant; and secondly, that other trees, besides the pine, the gum and red oak, are shown as those boundaries. If this would not control the description, when it is shown that this pine, this gum, this oak, are the trees called for in the deed, I cannot understand how the mere course and distance of the grant can control it, as no other tree is shown as the boundary of the grant. To adopt this rule, would be to abandon a certain description under a pretence of greater certainty, and when called upon for this greater certainty, to refer to course and distance, which is admitted to be the least certain of any description, and only resorted to when all others fail. I must conclude, therefore, that whatever may have been the title of *Walker* to the lands without the grant, that his deed to *Colson* covered the lands up to those trees, if they are shown to be the trees called for as *termini* in his deed; and therefore, the deed was color of title up to them. It seems to me also, that the judge was too rigid in the rule respecting the *termini* of the grant; for if we are not permitted, in cases of very old grants calling for perishable *termini*, such as trees, to substitute something for the tree, which may long since have perished, or been destroyed; such as a long continued possession under the grant, pointing to the place where the trees stood, and of the adjoining lands, the reputation of the neighborhood, and the calls of coterminary grants or deeds, we shall, in almost every case of old grants, be remitted to courses and distances, which will give in many cases, a different location to them, from that which they originally had. I do not say that this is one of the cases requiring it; it may, or may not be, and therefore, the new trial is granted on other grounds.

Where the calls of a grant, and the calls of a deed, or of two deeds are the same, and the *termini* are unique;

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then as the *termini* are the same, the locations are the same, for there are not two objects of the same kind as those called for in the grant and deed. But where the *termini* are not unique, as a pine, a hickory, an oak or a rock, as there are many pines, hickories, oaks and rocks, there may be proof to show that particular trees or rocks, are the trees or rocks called for in the deed, though there may be no proof, or not sufficient proof to show that they are the trees called for in the grant, and the proof not being sufficient to fix the location of the patent, cannot remove that of the deed, and transfer it to the location of the patent by its courses and distances. I think the facts in this case duly exemplify and illustrate the above positions.

Per Curiam.—Judgment reversed.

William G. Erwin v. Sarah Erwin.

An appellant who has failed to file his appeal, is not entitled to a *certiorari*, after a delay of three terms. He should apply at the first term, unless prevented by accident.

This was an application for a rule upon the defendant, to show cause why a *certiorari* should not issue. The applicant swore, that the judgment against him was rendered at the Spring Term 1831, of Rutherford Superior Court; that he then prayed an appeal, which was allowed; that the appeal bond and the record of the cause were sealed up, and deposited in the Post-office at Rutherfordton, the postage being paid, directed to the Clerk of the Supreme Court, in time to reach the office of that court, within the first seven days of the ensuing term; that not hearing of any adjudication in the cause, he had, since the last term of the court, caused enquiries to be made, from which he learned that the package above mentioned, had never come to the hands of the Clerk of the Supreme Court.

No counsel appeared for the applicant.

RUFFIN Judge.—The appeal was taken in April, 1831, and this application for a *certiorari* is now made —in December 1832, eighteen months, after the record ought to have been filed in this court. We do not think proper to consider whether the grounds laid for the relief asked, would have been sufficient, had the motion been made at an earlier and proper period. For the motion comes out of due time, and must on that ground, be refused.

It is true, the party swears, that since the last term, he learned for the first time, that the transcript had miscarried. But his duty was to have enquired earlier; to attend to his cause, in person or by attorney, at the first term (unless prevented by accident;) and then to have taken the necessary steps to have the case brought up and decided.

By the course of the court, the application for this extraordinary remedy must be made as soon as the party can, after losing the benefit of his appeal. It can no more be granted to one who is dilatory in asking for it, than it can be to one who has neglected to pray an appeal when in his power. He who fails from negligence, duly to prosecute an appeal, is as little entitled to aid, as he who from the same cause, failed to obtain an appeal. The rule is therefore refused.

PER CURIAM.—RULE REFUSED.

THOMAS CLANCY, *Chairman, &c. upon the relation of* JAMES CARRINGTON v. NATHANIEL CARRINGTON.

Where an administrator procures himself to be appointed guardian of the next of kin to his intestate, but does not return an account as guardian—or in any way designate the property of his ward, so that it can be identified, the sureties to the administration bond are not discharged.

The case of *Harrison* v. *Ward*, (*ante p.* 417,) approved.

DEBT upon a bond, executed by the defendant, as surety of *John J. Carrington*, on his taking out letters of administration upon the estate of *John Carrington*. The bond was in the common form of administration bonds,

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and the breach assigned, was the non-payment by the administrator, of the relator's share of the residue of the intestate's assets.

After *oyer*, the defendant pleaded *performance* of the condition by the administrator.

Upon the trial, before MARTIN, Judge, at Orange, on the last circuit, the facts were, that the bond was executed in consequence of *John J. Carrington's* appointment as administrator at November sessions, 1817, of Orange County Court; that at the ensuing August sessions, he was appointed guardian of the relator, and gave the usual bond with other sureties: but he had never returned his account as guardian to the office of the County Court.

His Honor ruled, that *John J. Carrington* was, upon these facts, both administrator and guardian, and the assets being uniformly in his possession, that possession should be taken as being in the character in which it was rightful, which his Honor held to be that of guardian. In submission to this opinion, the plaintiff was nonsuited and appealed.

W. A. Graham, for the plaintiff, distinguished this case from that of *Clancy* v. *Dickey*, (2 *Hawks* 497.)

Badger, for the defendant.

HENDERSON, Chief-Justice.—The principle of the case of *Harrison* v. *Ward*, decided at this term, (*ante* p. 417) governs this: indeed it goes farther, for in that case, there was a return as administrator, here there was none as guardian. There is not the least proof here, that the money due to the relator, was at any time at, or after *J. J. Carrington's* appointment as guardian, in his hands. There is no return even acknowledging it as a debt, nothing but a bare presumption, that he then had it, because it was his duty to have had it, and this presumption, if it arises, is in a great measure repelled by his not producing it when afterwards called on. The evidence offered by the defendant, or rather relied on by him, for it is the relator's evidence, only proves that he ought to have, not that he actually had

it. This would be presuming too much in order to apply the judge's maxim, for had the defendant actually shown that the administrator at any time after he became guardian, had this money separated from other money, and marked as the ward's money, so as to make it the ward's property, or after two years from his administration, had it marked and labelled as money of the estate; there would in the case first put, be something wherewith to charge him as guardian, as by such appropriation it became the property of the ward, and in the second case, there would be facts upon which the judge's rule might operate. But in the case stated there is nothing to make this sum the property either of his ward, or of the estate, so as to leave room for a presumption in which character *J. J. Carrington* held it. In *Clancy v. Dickey*, the negroes had been of the estate, the executor became guardian, and had them in his possession after the time in which he could rightfully hold them as executor. The law therefore adjudged, in the absence of positive proof, that he held them as he rightfully might, viz: as guardian.

PER CURIAM.—JUDGMENT REVERSED.

SAMUEL P. SIMPSON v. VARDY MCBEE.

An agreement between the parties to a cause, made after the issuing, but before the return of the writ, referring the suit to arbitration, and making the submission a rule of court, does not authorise the entry of a judgment upon an award filed at the return day of the writ.

This was an action on the CASE, for slanderous words spoken of the plaintiff, by the defendant.

The writ was issued on the 27th of August, 1831, returnable to the ensuing term of Lincoln Superior Court. The defendant accepted service of the writ on the 31st of that month, and on the 1st of September following, the parties entered into an agreement in writing, whereby the matter in controversy was referred to the arbi-

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trament of two persons, "whose award made as above, shall be a rule of court." The arbitrators made their award on the 22d of October following, before the return day of the writ; and on the Monday of the ensuing Superior Court of Lincoln, it was handed to the clerk, when the defendant filed exceptions to it, and pleaded to the action. On the last Fall Circuit, Swain, Judge, overruled the exceptions, and entered judgment according to the award, from which the defendant appealed.

W. A. Graham, for the defendant, contended, that the agreement to submit, was a matter in *pais*—that the submission could not be a rule of court, unless made after the cause was in court, and that judgment could not be entered upon the award, or an attachment issue for not performing it, the only remedy being by an action on the agreement. He cited *Tidd's Practical Forms* 148.

Badger, contra, argued, that the issuing of the writ constituted the *lis pendens*, and that at common law, before the statute of *Will.* 3, either party had a right to have an agreement of this kind, made a rule of court.—He cited *Tidd's Practice* 75.

Daniel, Judge, after stating the case as above, proceeded: The agreement of the parties, out of court, set forth in the submission, that the award should be a rule of court, did not make the rule. And although the agreement was made during a *lis pendens*, yet no attachment could have issued, according to the principles of the common law, against the defendant, for a violation of that agreement. A rule of court to stand to a submission and award, was, according to the common law, a rule entered in some one of the courts at Westminster, where the record and pleadings in the cause were made up. A party who consented to have such a rule entered, and disobeyed it afterwards, was subject to an attachment for a contempt. We have, after diligent search, been unable to find any authority, estabishing the principle, that an agreement of the parties pending a suit, to submit to arbitration, and that the submission and award should be a rule of court, was in fact, such a rule,

as by the principles of the common law would authorize an attachment to issue for its violation. In this state, it is the practice to enter judgment according to the award, in those cases, in which, by the rules of the common law in England, an attachment would have been granted, for a disobedience of a rule of court, to stand to the submission and award. We therefore, think that the Superior Court had not power to enter the judgment, which was rendered in this case. The statute of 9 and 10 *Will.* 3 *c* 15 is not in force in this state.—The judgment might have stood perhaps, according to the provisions of that statute. As there was not such a rule of court entered in this case as would have authorized an attachment at common law, and the statute of *Will.* 3. not being in force here, we are compelled to set aside the judgment, and award a *procedendo.*

In this state, judgments are entered upon awards where by the rule of the common law, attachments would issue for their non-performance.

The statute of 9 *Will.* 3, respecting references, is not in force here.

PER CURIAM.—JUDGMENT REVERSED.

DEN *ex dem.* RICHARD H. BONNER *v.* READING TIER.

A judgment on a *sci. fa.* against an heir, in when his name is neither set forth in the writ nor in the return of the sheriff, is a nullity, and a purchaser at an execution sale under it, acquires no title.

EJECTMENT, which was submitted to DANIEL, Judge, at Beaufort, on the last Fall Circuit, upon the following case agreed:

One *Cherry* obtained a judgment against the administrator of *Andrew Christie*, in which the plea of *fully administered*, was found for the defendant. A writ of *scire facias* issued on this judgment, by which the sheriff was directed to "make known to————————heirs or "devisees of the said *Andrew*, that, &c." This writ was returned, "not found," and an *alias* issued in all respects precisely like it, to which there was a similar return. Upon the return of the second writ, judgment by default was entered up, and the lessor of the plaintiff purchased under an execution issuing upon it.

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Upon these facts, his Honor gave judgment for the plaintiff, and the defendant appealed.

Gaston, was to have argued for the defendant, but the court called upon *Hogg* and *J. H Bryan*, who were for the plaintiff, to begin; they cited the act of 1784, *s.* 4, (*Rev. c.* 227,) authorising judgments to be entered up upon two returns of *nihil*, and *White* v. *Albertson*, (*ante* 241.) 2 *Saund.* 72, *a. Ib.* 72, *r. Denton* v. *Noyes*, (6 *John. Rep.* 296.)

Ruffin, Judge.—The judgment on the *scire facias* is a nullity for the want of a party defendant. It is true, the heirs need not be named in the process, and frequently it is best not to name them, because, if one be omitted, and advantage taken of it, by plea of the other, it may be difficult to get over it; whereas, if the process be general, and the sheriff fail to return all the heirs, that, upon suggestion, may be supplied by further process. The defect here does not consist in the omission of the names of the heirs in the *scire facias*, but that omission runs throughout. Neither the plaintiff has named him, or the sheriff returned him. So that in no part of the proceedings does it appear who is heir, nor certainly that there is one. It is said, that he may be out of the state, and in that case, there could not be service; and yet, the plaintiff could have judgment under the fourth section of the act of 1784. But it must appear who in particular is out of the state, in order that there may be a person before the court. If the plaintiff name the heir, the sheriff may return that that person resides without the state. If the sheriff is commanded to summon the heir generally, and the heir resides here, he cannot return generally that he has summoned the heir, but must say who is heir, and that he has summoned him. And as the return of a foreign residence is only in the place of actual service, the sheriff must in that case, say that such an one is heir, and that *he* resides out of the state. When no heir is known, the University is the owner, of the land and must be brought in.

The cases cited for the plaintiff have no application. There the defendants were irregularly brought in, or proceeded against irregularly. Here no defendant is before the court in any manner, and the judgment is against nobody. It is void and all proceedings under it.

PER CURIAM.—JUDGMENT REVERSED.

MARVILLE SCROGGINS v. LUCRETIA SCROGGINS.

Fraud in the contract of marriage, to entitle a party to a divorce, must consist of something more than mere concealment of defects—there must be such misrepresentations as would deceive a person of ordinary prudence; and where the husband, at the marriage, might have known that his intended wife was pregnant, and five months afterward she had a mulatto child: It was held, that he was not entitled to a divorce.

The construction of the act of 1827, c. 17, giving the Superior Courts exclusive jurisdiction in all cases of divorce, stated by RUFFIN, J.

This was a petition for a divorce. The petitioner stated, that the marriage took place on the 18th of December, 1828; that the parties "lived together in unin-" terrupted harmony for near five months, when the in-" fidelity and fraud of the defendant was manifested by " an occurrence which admitted of neither explanation " or palliation, and dissipated all hopes of happiness, " &c.; that on the 1st of May, 1829, the defendant be-" came the mother of a mulatto child." The petitioner proceeded to negative the idea of condonation on his part, and prayed for a divorce, *a vinculo matrimonii*.

His Honor, Judge MARTIN, at Buncombe, on the Spring Circuit of 1831, dismissed the petition, thinking that the facts stated in it, if true, did not authorise the sentence prayed for. From this judgment, the plaintiff appealed.

J. Graham, for the plaintiff.—The petition seems to have been dismissed in the court below upon two grounds:

1st. Because the act of 1827, c. 19, is to be construed with reference to the act of 1814, (*Rev. c.* 869,) prescribing *the mode of proceeding*, for the causes of divorce defined

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in the latter, and not as authorising divorces *a vinculo matrimonii*, for causes other than *impotency* or *adultery*.

2d. Because, if this is not the true construction, still the intention of the legislature was not to confer upon the courts an unlimited discretion; but, that they should be governed in such cases, by the principles of ecclesiastical law, and the law of revelation; and the case presented by the petitioner, would have been remedied by neither.

It is submitted, upon the part of the petitioner, that the first reason assigned, is contrary to the whole current of legislation upon the subject. The act of 1814, authorises divorces for two causes only, and was passed to free the legislature from the numerous applications *for those causes*, and to send the applicants to a tribunal where the facts could be investigated in the mode best calculated to elicit truth, at *the cost* of the parties. "To guard against the effect of sudden passion," &c. (*sec.* 6,) various checks were provided. *Six months* must have elapsed, before the filing the petition; *twelve months*, before obtaining a decree, (*sec.* 7;) no person, who had not been *a citizen of the state* for three years, immediately previous to the institution of his suit, was entitled to the benefit of the act; the party cast, paid a tax of £10 to the state, (*sec.* 9;) which the petitioner gave security for, and finally, a decree when obtained, was not "valid until ratified by the General Assembly," (*sec.* 4.) The act did not produce the desired effect, the time and the attention of the legislature were occupied by applicants whose cases were either not of the description provided for, or who were kept out of court by some of the restrictive provisions. The result is well known, and need not be stated here, and the legislature, to remedy the evil, proceeded to remove, one by one, the impediments which blocked up the avenue *to the courts*, that they might be enabled thereby, to close the door to all legislation upon the subject. They have done so, unless the courts choose to make, rather than expound the law.

Thus the act of 1818, (*c.* 968,) repeals the 4th section of the act of 1814, which required the decree of divorce

"to be ratified by the General Assembly." The act of 1824, (c. 1248,) extended speedy justice to the poor and necessitous, by repealing the 6th section, imposing a tax of £10 on the party cast, and requiring a delay of twelve months to intervene between filing the petition and the decree; and the act of 1827, (c. 19,) proceeding in the same spirit, by the first section, gives to the Superior Courts "sole and original jurisdiction *in all cases* of application for divorce." If this were ambiguous, the second section would remove all doubt:—"All applications *for other causes*, than those specified in the act of 1814," are to be subject to the rules and regulations provided in said act. The Superior Courts then, have *sole and original jurisdiction in all cases of divorce*, and this includes in the language of the act, "*other causes than those specified in the act of* 1814."

Does the case of the petitioner present one of the "other causes," for divorce, in the contemplation of the legislature? The answer to this inquiry, requires an examination of the second reason relied on in the court below. It is unnecessary to recapitulate the facts stated in the petition, or to dwell upon the character of the transaction. The imagination can scarcely conceive a case, which is calculated to awaken a larger share of sympathy in the human bosom. Can any one acquainted with the proceedings of the legislature, for the last twenty years, doubt as to the course which that tribunal would pursue under such circumstances? And it is submitted, whether the courts, created by the legislature, as organs of legislative will upon this subject, may not look to their proceedings for precedents, with as much propriety as to the ecclesiastical or the levitical law?—Slavery, as it exists here, was unknown to either. No case of equal enormity with the present, ever arose, or could have arisen for the consideration of their tribunals. There is, however, no difficulty in pronouncing what would have been the decision of the courts, in such a case, under either system of jurisprudence. By the levitical law, as expressly recognized by our Saviour, a *fraud*, of the character disclosed in the petition, without

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the degrading distinction of *cast and color*, was not only sufficient cause for divorce, but was punished with death. (*Deuteronomy XII*, 13 to 22.)

If we resort to the common law, as administered by the ecclesiastical court, for precedents, very slight causes have been held to warrant a divorce. "A marriage, procured by force or *fraud*, is void *ab initio*, and may be treated as null by every court in which its validity may be incidentally drawn in question." (2 *Kent's Com.* 66.) "The common law allowed divorces *a vinculo, causa metus, causa impotentiæ*, and those were cases of a *fraudulent contract*." (*Id.* 67.)

"Divorces, *a vinculo matrimonii*, (says Lord *Coke*, 1 *Inst.* 235, *a.*) are these, *causa precontractus, causa metus, causa impotentiæ, seu frigiditatis, causa affinitatis, causa consanguinitatis*, &c. And I read in another record, *coram rege Termini Pasch.* (30 *E.* 1.) *William Chadworth's case*, that he was divorced from his wife, for that he did carnally know her daughter before he married the mother." Either of these offences, in point of moral turpitude, or considered with regard to the degradation and misery in which the injured party is overwhelmed, presents a picture of comparative innocence and harmlessness. The common law in England, would have afforded a remedy, if the facts had existed, and it is abhorrent from all the better feelings of our nature, to suppose that it will not do so here.

Dews, for the defendant.—The act of 1827, gives to the Superior Courts "sole and original jurisdiction in all cases of applications for divorce, whenever they may be satisfied upon due evidence presented, of the justice of such application;" but at the same time affords no standard by which so unlimited a discretion is to be regulated or controlled. If the discretion of the courts is as unrestrained as the loose and general phraseology of the act would literally imply, then the law upon the subject would fluctuate with the varying opinions of different judges, counsel can neither advise with confidence, nor courts decide with

certainty, the sanctity of the marriage compact will be impaired, and the morals of society most seriously endangered. The courts in their construction of this act, must feel themselves compelled to regulate their discretion by some known and pre-existing standard; the previous acts of Assembly enumerating certain causes for divorce, the ecclesiastical law of the spiritual courts of England, and the law of revelation, each afford a rule of decision clear, definite and safe. Adopting any or all of these as rules of decision, fraud in the marriage compact in relation to a matter existing at the time of the compact, constitutes no cause of divorce, *a vinculo matrimonii*.

Should it be considered by the court that the parties should be divorced when it is apparent they can no longer live together amicably, such a determination would be liable to the objection of extreme vagueness and uncertainty; the decision of this question upon a given state of facts would vary with the different characters and temperaments of judges, and would vary still more with the varieties and feelings, disposition and rank of different parties. Such a determination would also be liable to the additional and forcible objection, that the known existence of such a rule, would be calculated to produce as a result, the very state of things for which it was designed as a remedy. Breaches would be widened, and animosities inflamed in the domestic circles, which the mutual interest of the parties would have otherwise predisposed them to conciliate and reconcile.

If the courts do not feel themselves bound by any standard in the exercise of their discretion, then in in this case, the prayer of the petitioner does not exhibit such a state of facts as should entitle him to a divorce; a divorce is applied for in consequence of a *fraud* in the marriage compact; the concealment of a fact which if known would have prevented the engagement. The mere concealment of temper, of disposition of circumstances, of previous incontinence, and even the gross and outrageons deception alleged in the petition, are

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all equally frauds *pro tanto*, and differ from each other only in degree. If courts admit *fraud* as cause for severing that union, civil to some purposes, but clothed with religious forms, and involving religious obligations, where or how can they fix the degree, or the limit?

A decision adverse to the prayer of the petitioner in a case presenting so strong an appeal to public sympathy, will do more to counteract the demoralizing influence of the act of 1827, than a similar decision in a case less aggravated and imposing.

Ruffin, Judge.—The legislature in the act of 1814, authorises divorces in two cases; the one, impotency at the time of the marriage and still continuing; the other, a separation by one party from the other, and living in a state of adultery. The act of 1827, *c.* 19. empowers the Superior Courts to divorce either from the bonds of matrimony, or from bed and board, whenever they may be satisfied of the justice of the application.

This act imposes a task of great difficulty on the courts, and one, perhaps less agreeable than any they can be called on to perform, that of acting upon a most important subject without a rule laid down for them by the legislature, or heretofore adopted by their predecessors. The jurisdiction is a new one to our courts, and we find no precedents in those adjudications from which we draw our learning upon other subjects. Where such a jurisdiction is created, and the Legislature marks out those boundaries within which, in their wisdom, they think it proper the courts should be confined, or to which they shall go, obedience is both an easy and a pleasing duty. It is when we are told to do what is right, but not told what they deem right, that we are lost in the mazes of discretion. I cannot suppose however that the discretion conferred is a mere personal one, whether wild or sober; but must from the nature of things, be confined to the cases for which provision was before made by law or for those of a like kind. This presumption is the stronger, when the sub-

ject is one upon which it is known that speculatists and moralists have much disputed, differing as to the policy of divorces and their influence upon the parties themselves, during their union, and after their separation; and upon which law-givers, acting upon experience and disregarding theory, have generally been agreed in refusing them altogether, where the marriage was lawful, except in the case of impotency. If the court could think that the duty to be performed was intended to be referred to the private opinions of the judges, it would be promptly, though reluctantly, executed; for there is no member of the court who is not strongly impressed with the conviction, that divorces ought in no case to be allowed, but in that already mentioned, and near consanguinity. We know, that individuals may experience much misery by an unhappy connexion, where tempers are incompatible; where there are disgusting personal defects; moral depravity; mutual injuries, proceeding even to unfaithfulness and unchastity. We know too, that like consequences often follow from a mere change of affection; and that the growing indifference of the one, not only produces pain to the other, but irritates and provokes reproaches, until hatred takes the place of former regards, and the tie between them is severed, as far as the law will allow it. If the consequence of dissolving the union entirely, stopped with those parties, and conferred on them peace, instead of the pain they suffered, it were but cruelty not to unloose the chain. But the knowledge that when this last stage of distress arrived, it would of itself bring relief, would precipitate its approach. Slight differences would grow into lasting dissentions, and a single act of unfaithfulness could easily be converted into habitual adultery. These evils are, in a great measure, avoided by the principle of our law, which declares the marriage contract to make a perfect union between the parties, so that they become one; and, to carry it out, they ought to believe and feel that they are ever to remain so—that absolute union is also indissoluble. That and that alone, can impress upon each, the necessity of mutual forbearance, of submitting to slight inconve-

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niences, overcoming antipathies and contributing to the enjoyments of each other. We reconcile ourselves to what is inevitable. Experience finds pain more tolerable than it was expected to be; and habit makes even fetters light. Exertion, when known to be useless, is unassayed, though the struggle might be violent, if by possibility it could be successful. A married couple thus restrained, may become, if not devoted in their affections, at least discreet partners, striving together for the common good, and steady friends, ready to perform all offices of kindness required by the other—instead of the dissentient heads of a distracted family, driven by inflamed passions to a degree of madness, not to be satisfied with less than an entire separation, though it bring disgrace on themselves and their offspring, and deprive the latter of the greatest earthly advantage, the nurture and admonitions of a parent. For these reasons in most, and I believe, in all christian countries, although the contract be regarded by the law merely as civil, it is usually executed with some religious ceremonial; so as in a degree to impress upon it, in the eyes of the individuals themselves, a character of holiness—that it may appear to be entered into before a witness who cannot be deceived or forget, and therefore, to be infrangible. Our restless dispositions, and capricious tastes and tempers, require these checks and restraints. Why shall they be removed? Why give way to those very propensities in our nature, which it is our interest to repress? Is it not wiser, better, kinder to the parties themselves and their issue, to declare the engagement to be unsusceptible of modification, much less abrogation—to make their union so intimate, so close, and so firm, that no discoveries of concealed defects, more than supervenient disease, depravity, dissoluteness or dissension could rend it asunder? Such being the case, the state would be the more discreetly entered into, and the intercourse through life be the more harmonious. Such considerations have produced the private convictions felt by those who are now the judges of the court. But they seem not to have made the same impressions on all; and it is our duty,

notwithstanding the unlimited powers which we are commanded to exercise, to endeavor to ascertain, as well as we may, in what cases the legislature would, upon ascertained facts, authorise the parties to abandon their former choice, and make a new selection.

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To the extent of the act of 1814, we consider the court constrained to go. And from the second section of the act of 1827, we suppose that we are not at liberty to stop there, since that implies, that there are other cases besides those specified in that act, in which divorces seem to have been expected to be properly applied for, and consequently granted. Yet, from the preamble of the last statute, one might infer the contrary; and that the great purpose of the legislature was to free itself from applications which ought not to be granted, but which, from the hardship to the parties, and feeling in the members, were sometimes obtained; and to turn them over to tribunals which would do more impartial, or exact justice. Indeed, it is difficult for persons to put a just interpretation upon terms, conferring in themselves such boundless power. We cannot intend that the meaning was, that the courts should grant divorces, where, under like circumstances, the legislature had, or might be expected to grant them by statute; for the contrary is implied by commanding the action of courts, usually regulated by fixed rules. The court is then obliged to adopt the middle course, and prescribe to itself such principles as we think sound law-givers, who allow of divorces at all, would send as rescripts to a judiciary.

The case now before us, rests upon a matter existing at the time of the marriage. And it must be admitted to be as strong a case as can well be, if the petitioner acted properly, and with reasonable discretion or caution on his part. The principle of the common law upon the question of divorcing for matter existing at the time, is well established. If the marriage was not forbidden to both parties by their relationship, it was dissoluble at the instance of one for pre-contract and impotency. The former was of ecclesiastical origin, and no longer exists. The latter only remains, and is incorporated into our

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statute of 1814, at which time the legislature thought it unsafe to go farther. And since that time, although they allow the courts to go beyond that, they have been unwilling or unable to say how much farther. And the court is perhaps no less at a loss, nor less reluctant to proceed. The petitioner puts the case upon the ground of fraud. If it were a marriage to which he had been compelled by force, or in which one woman personated another, where indeed, there was no consent on his part, that would probably be cause for a divorce. But the fraud here consists in the other party not having the qualities and character he supposed her to have. It would be dangerous to lay down a rule of that sort. It is impossible to say where it would stop; what were the qualities in a wife which a husband wished or expected, or had reason to expect. It cannot be known what defects he knew of and disregarded; what were concealed, and what communicated. Treaties upon this subject, are generally conducted in secret, and the particulars cannot be proved. It is moreover perfectly understood, that each appears, and will appear to the best advantage. It is not to be expected, that the parties will declare their own defects, as the seller of property would, and especially that they will publish their shame. Concealment is not a fraud in such a case—disclosure is not looked for—active misrepresentations and studied and effectual contrivances to deceive, are, at least, to be required, to give it that character; and the other party must appear not to have been voluntarily blind, but to have been the victim of a deception which would have beguiled a person of ordinary prudence. I know not how far the principle contended for, would extend. If it embrace a case of pregnancy, it will next claim that of incontinence; it will be said, the husband was well acquainted with the female, and never suspected her, and has been deceived; then, that he was a stranger to her, smitten at first sight, and drawn, on the sudden, into a marriage with a prostitute; that he was young and inexperienced, hurried on by impetuous passion, or that he was in his dotage, and advantage taken of the lusts of his imagination, which

were stronger than his understanding. From uncleanness, it may descend to the minor faults of temper, idleness, sluttishness, extravagance, coldness, or even to fortune inadequate to representations, or perhaps expectations. There is, in general, no safe rule, but this: that persons who marry, agree to take each other *as they are*. Whatever defects there may be, some must have been counted on, and we cannot tell which. There are degrees in imperfection, as well as perfection; and the wife may prove much better than the husband expected; so if she turn out worse, he must keep her because he chose her. It is not the policy of the law, that man or woman, who has once fallen, shall be condemned to celibacy, and doomed to incontinence. Yet such would be the effect of allowing this petition. The woman must disclose her misfortune and crime, or else the marriage will be declared void; but if she disclose it, she loses that marriage, and places it in the power of the suitor to proclaim her shame, and preclude her from any other alliance, and from reformation. The safer, more politic, and more humane principle is, to make it his interest to conceal the fault as well as hers, and by uniting their interests, to induce both to look forward to future proprieties, and be blind to what is behind. After the law upon this subject, has been settled for ages, and when the legislature has been unable to devise any alteration, founded on a general principle, worthy of their adoption, it would be too much to expect a court to pretend to more wisdom than the legislature and our fore-fathers united, and strike out new theories. And we cannot but say, that nothing could be more dangerous than to allow those who have agreed to take each other, in terms *for better, for worse*, to be permitted to say, that one of the parties is worse than was expected, and therefore, the contract ought to be no longer binding.

These are the general principles by which the court is constrained to limit and regulate the unrestrained liberty of rioting at large, to which it is left. The court is, nevertheless, entirely sensible of the peculiar character of this case, produced by the odious circumstance

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of color. It appeals powerfully to the prejudices, the virtues and vices of our nature. The stigma in our state of society is so indelible, the degradation so absolute, and the abhorrence of the community against the offender, and contempt for the husband so marked and unextinguishable, that the court has not been able, without a struggle, to follow those rules which their dispassionate judgment sanctions. But there are other circumstances in this case, which relieve us from all difficulty. The petitioner charges, that he was married on the 18th of December 1828, and that the child was born on the 1st day of May, 1829; up to that time, he lived with his wife, and upon that event left her. He does not venture to swear, that he believed her chaste, at the time of the marriage. It must be taken, that he did not; if he had, it would have been the first thing thought of, to aggravate his case. Suppose that we are to presume, that he means to admit a criminal conversation between themselves; and that is the most favorable to him—what claims has he to relief, upon the ground of grosser incontinence than that in which he had participated? The legislature gives us in the act of 1814, an analogous rule for our government in this case.—They declare that condonation shall destroy the right of divorce; either, because it evinces prior consent, or an indifference to the crime, which alike render him unworthy to ask the interposition of the law. Upon the same principle, if a man will marry a woman, whom he knows to be a prostitute, and she takes no affirmative means of establishing a conviction in his mind, that he alone, has had access to her, he can not complain if he has been betrayed by a confidence as irrational, as it proves to be unfounded. No man in his senses can anticipate less. The fascinations and the total depravation of an unchaste woman have been proverbial, at least, since the days of Solomon. He who marries a wanton, knowing her true character, submits himself to the lowest degradation, and imposes on himself. No fraud can be said to be practised on him by mere silence and concealment of other aberrations. But if such be not

the fact in this case, then, that which is necessarily the state of it, leaves the petitioner as little merit. If he had not been himself, guilty, he had the more reason to believe that others had. It is not alleged that the birth of the child was premature. Half the period of gestation had expired at the marriage. His attention must have been attracted to the person of the woman he was about marrying, and the long intimacy and courtship which he mentions, must have enabled him to detect her situation. Why did he marry her? It may be possible, that he was deceived, and not by his own negligence, at that period. But it is impossible, that any art or device could have long prevented him from knowing the truth, that is, as far as this, that she was pregnant. If not by him, why did he live with her? Shall he be heard to say, that he would have been content, if the child, though not his own, had been white? We cannot but feel for his digrace; but it is rather sympathy with him, as being one of the family of man, than as he is, individually. His disgrace is voluntarily incurred, and he has no elevation of sentiment or feeling above it. We think him criminally accessary to his own dishonor, in marrying a woman whom he knew to be lewd; or, by continuing his cohabitation, after he must have known it, up to the happening of an event, by which the world acquired the same knowledge. He now asks to be freed from his bonds, because the infamy of his wife has become notorious, though he could reconcile himself, in secret, to the crime which makes her infamous. Such a prayer must be rejected, and the judgment of the Superior Court affirmed.

The full discussion thus entered into, has been deemed due to the legislature and the court itself, that the principles which will guide the court, may be plainly known. It is proper that they should be placed before the legislature, that if thought wrong by them, the court may be spared from running further into error, by having an authoritative guide to future action, in a rule prescribed definitely by the legislature itself.

Per Curiam.—Judgment affirmed.

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Jesse Barden v. Ann M. Barden.

Where a man was induced to marry a woman by her representing to him that a child she had was his, and that as to all the world but him, she was virtuous, and after the marriage he discovered that the child was black; it was held, Ruffin, J. *hesitante*, that he was entitled to a divorce, if the color was so indistinct as to mislead a man of ordinary diligence—or if the child had been carefully kept from his view.

Per Ruffin, J. A case of this kind is a concession to the deep rooted prejudices of the community upon this subject.

This was a petition for a divorce, in which the petitioner alleged that at the time of the marriage, he knew that the defendant had a child, but he thought it was his; that the defendant, by her artful conduct before the marriage, induced him to believe that she had ever behaved modestly and virtuously except in the instance above mentioned, which she pretended was the result of her attachment to him; that soon after the marriage, he discovered that the child was a mulatto, upon which, he had instantly parted from her. The plaintiff prayed a divorce, *a vinculo matrimonii*.

On the Fall Circuit of 1830, at Wayne, the cause came on to be heard before Donnell, Judge, when it appearing, that the marriage took place before the act of 1827, *c.* 19, his Honor dismissed the petition, and the plaintiff appealed.

No counsel for either party, appeared in this court.

The act of 1827, *c.* 19, giving the Superior Courts jurisdiction in cases of divorce, is retrospective in its operation

Ruffin, Judge.—The act of 1827, *c.* 19. is not altogether prospective. The remedy given by it is not confined to cases that might thereafter happen, but applies to those also, in which the grievance then existed. This is plainly to be inferred from the preamble, which denotes the purpose of the legislature to relieve itself forthwith and entirely from the consideration of any application for divorce, whether for existing or future causes.

Upon the merits, I confess, that I am individually, inclined to concur with the judge of the Superior Court, for the reasons upon which the case of *Scroggins* v. *Scrog-*

gins was decided at this term. But my brethren think there is a difference, and that this petitioner may prove himself entitled to relief. The petition was dismissed upon the face of it; and therefore, all the facts stated in it must be taken in this stage of the proceedings to be true. Among them is the one of deep die, that the child is black; and to that is added, the belief of the petitioner, that it was his own, and that this belief was created by the artful representations of the defendant. It is thought by the majority of the Court, that when a man is acting in good faith, and marries with the design on his part, to repair the injury done to a female, whom he supposes to be the reluctant victim of his own solicitations, which a strong and exclusive affection for him made her unable finally to resist, advantage shall not be taken of his confidence and honorable principles of action, to draw him on by false tokens and artful devices of this sort. If he had married before the parturition, he ran risks, and must patiently abide the results. The risks were obvious to his understanding. But by awaiting that event, and promptly following it up by consummating the contract, while the child was very young, it is but reasonable to conclude, that the birth of the child and the belief that it was his own, constituted a prevailing, perhaps the chief motive and inducement for this action. The obstacle with me upon this part of the case is, that the color is an object of the senses; and that it can hardly be supposed that a man would marry a woman because he believed her to be the mother of his child, without being drawn, even by curiosity, not to say, instinctive affection, to see the child itself. But it may be, that in so young an infant, whose mother was white, it might not be in the power of an ordinary man, from inspection of the face and other uncovered parts of the body, to discover the tinge, although it were so deep as to lead to the belief now, that it is the issue of a father of full African blood; much more, if the father had a mixture of both races in him. I am therefore directed to express it as the opinion of my brethren, in which I do not refuse to acquiesce, that the

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petitioner ought to be allowed to prove his case. He has many difficulties before him; for the ground of the opinion is not that the wife was delivered of a child by another father, or even by a black paramour; but that, such being the fact, she induced, by false representations and active means, as the exhibition of the child to the petitioner as his, a belief on his part, that it was his own issue, and that he did not, and could not, from inspection, ascertain the truth, or be reasonably supposed to be able to do it. If there were no representations in aid of the false token, or if there were and the hue was visibly inconsistent with those representations, the petitioner was not deceived, or ought not to have been, and cannot have redress. The opinion of the court then is, that the judgment of the Superior Court must be reversed, and the cause remanded to be proceeded in to ascertain the facts according to the statutes; and if it should upon the proofs turn out, that the child is of mixed blood, that the petitioner and defendant are white persons, and that he believed at the time of the marriage, that the child was white, and that belief was created by the representations of the defendant, that it was the offspring of the petitioner himself, and that upon inspection at that time, the real color was not so obvious as to be detected by the petitioner, or a person of ordinary diligence and intelligence, and not otherwise communicated to the petitioner, he would be entitled to a judgment of divorce from the bonds of matrimony. This is a concession to the deep rooted and virtuous prejudices of the community upon this subject.

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9. By Hall, J. An executor who has paid over the assets to the University, is not subjected to the claim of a creditor, not barred by the act of 1715; but the issue of fully administered, must be found for him, and the creditor must then proceed against the University. *Godley* v *Taylor, ex'r.* 178
10. When an executor sells the assets of

his testator, and takes a bond payable to himself *as executor*, and dies leaving the bond uncollected, *it was held*, RUFFIN, J. *dissentiente*, in the absence of any evidence that the executor had appropriated the bond to his own use, that both at common law and under the act of 1794, (*Rev. ch.* 415,) "to explain and supply the deficiences of certain acts of Assembly respecting sales by executors and administrators," the bond was of the assets of the testator, and an action on it might be brought by the administrator *de bonis non*. *Eure* v *Eure*, 206

11. By HENDERSON, C. J. In no case is the executor of an administrator liable *at law* to the creditors of the intestate. But upon a proper case, he may be made responsible *in equity*, on the ground that he is in possession of the fund liable to the payment of debts. *Conrad* v *Dalton*, 252

12. By the same. Is there any remedy against the executor of an administrator for a *devastavit* by the destruction of assets? QUERE. But if the administrator has converted the assets to his own use, *it seems* the administrator *de bonis non* may recover against his executor for money had and received. *Ibid*, 253

13. By RUFFIN, J. An executor cannot retain his commissions against a creditor or a legatee, until they have been allowed by the county court, or in a suit for the settlement of his accounts. They cannot be allowed by a jury upon the plea of fully administered. *Hodges* v *Armstrong*, 256

14. Where the plaintiff bailed a slave, and after the death of the bailee his executors continued in possession, it was held by HENDERSON, C. J. and HALL, J. that although the plaintiff might declare against the executors as executors, for a detention after the death of the testator, yet, as the testator's interest had determined, there was no proof to support the declaration In the same case, held by RUFFIN, J. that *detinue* will not lie against an executor for a detention after the death of the testator. *Mobley* v *Runnells*, 303

15. Where the same person is administrator, and also guardian of the next of kin, his returning an account of his administration, and acknowledging a balance due his ward, is not a performance of the condition of his administration bond. But it is otherwise if the money to pay the balance is identified, and retained by the guardian as the property of the ward. *Harrison, on the relation of Amason* v *Ward et al.* 417

16. In such a case, are the bonds cumulative. QUERE? *Ibid.*

17. Where a testator, in the event of the death of his executor, directed the county court to appoint some person to administer his estate, the executor of the first executor, is not the executor of the first testator. *Roanoke Navigation Company* v *Green*, 434

18. Where an administrator procures himself to be appointed guardian to the next of kin to his intestate, but does not return an account as guardian, or in any way designate the property of his ward, so that it can be identified, the sureties to the administration bond are not discharged. *Clancy, ex relatione Carrington* v *Carrington*, 529

Vide *Appeal*, 8. *Covenant*, 1, 5. *Executor de son tort*, 1, 2, 3, 4, 6. *Execution*, 9, 80. *Scire Facias—Trespass*, 3.

ADMINISTRATION.

Vide *Administrators & Executors*, 2, 3, 4.

ADMINISTRATION BOND.

Vide *Administrators & Executors*, 7, 15, 16, 18. *Bond*, 17.

ALIEN.

1. By HENDERSON, C. J. An alien can hold lands against the sovereign, until his estate is divested by an inquisition ascertaining his alienage. *Trustees of the University* v *Miller*, 191

2. By the same. The sovereign cannot seize lands, and prove the alienage *in pais* upon the trial of an ejectment. It can be proved only by an office found. So in cases of forfeiture for felony, the record of the attainder of the tenant must be produced. *Ibid*, 192

3. By the same. The native born child of an alien succeeds as heir where the estate of the ancestor has not been divested by an office found in his life-time. An office found after his death, does not affect the estate of the heir. *Ibid.*

4. By the same. The law will not cast an estate upon one who cannot hold it; and for this reason, an inquest of office is not necessary to prevent an alien from succeeding to an estate, *Ibid*, 193

5. By the same. If the heir be unable to take by reason of any disqualification which is not personal, as by his alienage, the next in degree succeeds, to prevent an escheat. But where the disability is personal, as by attainder, the next in degree cannot succeed, but the estate will escheat. *Ibid,* 196

AMENDMENT.

By RUFFIN, J. By the act of 1824, this court is bound to permit amendments which would be of course in the court below; but it is not authorised to direct them to be made in the court below, nor to make any but such as are necessary to support the judgment of the superior court. *Grist* v *Hodges,* 204

2. By the same. None can be permitted here, which would affect the judgment below, or upon which ordinarily a new plea is admitted. *Ibid.*

3. By the same. Notwithstanding the *dictum* in *Dowell* v *Vannoy,* (*ante* 43,) verdicts which are defective in form, from the misprision of the clerk, will be corrected in this court, if the substance is intelligible. *Ibid,* 207

4. By the same. Defects which require an actual amendment, and which are not cured by the statutes of *jeofail,* can be amended only upon the payment of all costs. *Ibid.*

5. Where the amount of damages laid in the writ was increased, the amendment was permitted upon the payment of all costs. HENDERSON, C. J. *dissentiente* as to the payment of costs. *Ibid.* Vide *Damages,* 2. *Judgment,* 3.

APPEAL.

1. The exercise of a discretionary power in the superior court, cannot be examined upon an appeal. *Cannon* v *Beemer* 393

2. The superior courts have a discretion to expunge an order made during the term, and an error in its exercise cannot be examined upon an appeal. *Sneed* v *Lee,* 364

3. The supreme court has no jurisdiction of an appeal from an order of the court below allowing commissions to an administrator. *Ex parte Haughton,* 441

4. By DANIEL, J. The allowance of four *per cent.* additional interest, under the act of 1807, (*Rev. ch.* 713,) is a matter of discretion, and cannot be revised upon appeal. *Ballenger* v *Barnes,* 460

5. By RUFFIN, J. Points which were not made on the trial, and if taken, might then have been disposed of, will not be examined on appeal. *Waller* v *Mills,* 515

Vide *case stated upon an appeal,* 1, 2, 3, 4, 5.

ARBITRATION AND AWARD.

1. If an action of ejectment be referred to arbitrators, an award stating the cause to be pending between the lessor of the plaintiff and the tenant in possession, without noticing the fictitious parties, is sufficient *Doe on dem. Oneal et al.* v *Butler,* 94

2. An agreement between the parties to a cause, made after the issuing, but before the return of the writ, refering the suit to arbitration, and making the submission a rule of court, does not authorise the entry of a judgment upon an award filed at the return day of the writ. *Simpson* v *McBee,* 531

3. By DANIEL, J. In this State judgments are entered upon awards, where, by the rule of the common law, attachments would issue for their non-performance. *Ibid,* 533

4. By the same. The Statute of 9 and 10 Will. 3d, respecting reference, is not in force here. *Ibid.*

Vide *Action—Limitation, Statute of* 4, 5.

ASSUMPSIT.

A count for money paid to B by A, at the request of and to the use of C, is supported by proof of the sale of a bond by A to B, and that B credited C with the amount. *Jones* v *Cooke,* 112

2. Assumpsit will not lie upon a promise to pay a debt when the same debt may be recovered in an action on a specialty; but it is otherwise, when from any cause, no action on the bond can be sustained. *Wilson* v. *Murphey,* 352

3. Where land was demised by deed, and the lessor covenanted to pay for certain work done on the premises by the lessee, and after the expiration of the term, the lessor promised to pay the lessee an ascertained balance for the work done; held that assumpsit for the work was improper. *Ibid.*

ATTACHMENT

Vide *Abatement,* 1. *Garnishment.*

BAIL.

No matter can be pleaded in discharge of

the liability of bail, except the death or surrender of the principal. *Granberry & Parker* v *Pool*, 155

2. By RUFFIN, J. If it is unlawful for the principal to come into the State, or if he is imprisoned abroad for a criminal offence, the court will in its discretion relieve the bail. But no relief will be given, where the bail is imprisoned abroad for debt. *Ibid*, 157

3. By the same. A plea of the death of the principal, cannot be received in this court, because it has no jury to ascertain its truth. *Ibid*, 158

4. The proper county to which a *ca. sa.* should issue, in order to change the bail, is the county where the original writ was executed. *Finley* v *Smith*, 247

5. By RUFFIN, J. If the defendant has no fixed residence in the State, then the *ca. sa.* ought to issue to the county, where the bail bond was taken, that the bail may have notice. But if the defendant has acquired a domicil in another county, and the plaintiff has notice of it, the *ca. sa.* ought to issue to that county. *Ib.* 249

6. By the same. A temporary residence by a single man, without property, is not such a change of domicil as justifies the plaintiff, in order to change the bail, in issuing the *ca. sa.* to any other county than that in which the original writ was executed. *Ibid.*

7. A sheriff, who is special bail, may, under the act of 1777, (*Rev. ch.* 116,) surrender the principal to himself, and after the surrender, he detains the principal and notifies the plaintiff thereof, his liability as bail ceases. *Huggins* v *Fonville*, 392

8. By DANIEL, J. If a sheriff, who is bail, surrender the principal to himself as sheriff, and afterwards there is an escape, the remedy is by debt or case. *Ibid*, 394

9. Bail may surrender their principal after a verdict, but before a final judgment against them. *Moody* v *Stockton*, 431

10. The act authorising such a surrender, necessarily authorises some mode of averring it—it should be by a plea framed so as to enable the plaintiff to deny the surrender, and contest the identity of the principal. *Ibid.*

Vide *Escape.*

BAILMENT.

By HENDERSON, C. J. Although the bailee is not permitted to dispute the title of the bailor; yet, if the latter, by his own showing has none, he cannot recover. *Mobley* v *Runnels*, 303

Vide *Lex loci contractus* 2. *Possession* 2.

BANK STOCK.

Stock standing on the Books of the Bank of Newbern, in the name of the President and Directors of the Literary Fund, is Stock held by the State, within the meaning of the act of 1814, (*Rev. ch.* 780, *s.* 11,) extending the charter of that Bank; and therefore not subject to taxation. *State* v *Bank of Newbern*, 372

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where A and B were endorsers of a bill drawn for the accommodation of C, and A, being the first endorser, paid it, and afterwards received the note of C, endorsed by B, for one half the amount, it was held, that this note was not given for the accommodation of A and that he might recover on B's endorsement.—*Hatcher* v *McMorine*, 228

2. A bond payable on demand, which is assigned eight years after its execution, is dishonored, and liable, in the hands of of the assignee, to all the defences which the obligor had against the obligee. But these defences, in order to be available at law, must be legal defences. *Haywood* v *McNair*, 231

3. In an action upon a promissory note, a total failure of consideration may be given in evidence to defeat it; but it is otherwise where there is only a partial failure; that can be remedied by a distinct suit. *Washburn* v *Picot*, 390

4. In an action by the holders of a bill of exchange, against a bank, for not giving the drawer notice of a non-payment by the acceptor, the fact of the drawer's insolvency, may be estimated by the jury, in assessing the amount of damages.—*Stowe* v *The Bank of Cape Fear*, 408

Vide *Principal and Attorney. Usury*, 1, 3, 4, 5.

BOND.

1. Bonds given by officers for the faithful discharge of their duty, which do not conform to the act requiring them, can only be enforced according to the rules of the common law; and a bond given by a sheriff in a penalty greater than that required by the act of 1777, (*Rev. ch.* 118,) is not

within the provision of that act, authorising successive suits on sheriffs' bonds, and is extinguished by the first judgment thereon. *Branch, to the use of the Bank of Cape Fear* v *Elliott.* 86

2. By RUFFIN, J. In debt on a bond, the verdict need not state its amount. *Ib.* 88

3. By the same. The rule adopted in this court respecting official bonds, which do not conform to the act requiring them, is disapproved, but followed. *Ibid.*

4. By the same. But although a judgment upon such bonds is a bar to a second suit, if the bond is within the statute, (8 and 9 William 3d,) the relator may have a *sci. fa* suggesting other breaches; or if not within that statute, execution may issue at his risk, leaving the defendant to seek relief in equity. *Ibid.*

6. By RUFFIN, J. It *seems* that a bond, which is retained by the obligor and subsequently delivered, does not relate beyond the actual delivery. *Leadman* v *Harris,* 144

6. After a bond has been discharged by the principal debtor, it cannot be set up again to the prejudice of a surety, by a subsequent agreement between the principal and obligor. *Woodman* v *Mooring,* 237

7. An alteration in a bond, which is prejudicial to the obligee, as where the date was altered so as to deprive him of one year's interest, is presumed to have been made before the execution. *Pullen* v *Shaw,* 238

8. The acts of Assembly which direct the justices of the county courts to take bonds in certain cases, confer on them as to such bonds, a corporate character; and they may take a bond from one of their number to themselves. *Justices of Cumberland* v *Armstrong,* 284

9. By RUFFIN, J. A bond payable to the justices of a county which is not taken according to the direction of the act authorising it, may be supported as a valid bond at common law. But an action must be brought on it in the name of the surviving obligees, and not in that of the successors. And if one of the obligees be a justice at its execution, it is void as to all. *Ibid,* 286

10. A bond made, by a guardian and his sureties "to A, B, and the rest of the justices," is not in pursuance of the act of 1762, (*Rev. ch.* 69, § 7,) and can be supported only at common law. If one of the obligors be a justice at its execution, it is void as to all. *Justices of Currituck* v *Dozier,* 28

11. A bond payable to the justices of a county, executed by several persons, one of whom is a justice of that county, is void as to all the obligors. *Justices of Chowan* v *Bonner,* 287

12. By RUFFIN, J. A personal incapacity of one obligor does not affect the validity of the bond as to the others; but it is otherwise where one of them is both obligor and obligee. *Ibid,* 290

13. Where an order of the county court allowed a guardian to renew his bond with A and B, his sureties, and a bond not drawn according to the statute as an official bond but good in its form as an obligation at common law, was sealed by A only, and left with the clerk, it was held that a delivery could not be inferred, there being no evidence of an actual delivery. *Fitz ex relatione Slade* v *Green,* 291

14. By HENDERSON, C. J. A bond payable to "A. B. chairman, and other justices of the court," &c. is in law payable to A. B. alone. *Ibid,* 296

15. Bonds intended to be official, but which are not in conformity to the statute, may be declared on as voluntary bonds at common law. *Williams* v *Ehringhaus,* 297

16. By RUFFIN, J. A bond payable to the justices of a court, has the same validity as if it described the obligees by name. *Ibid,* 298

17. A bond to the chairman of the county court, his "executors, &c." is not an office bond, for the want of the words "successors, &c." But it enures as a private bond, and a delivery to the clerk is sufficient, unless the obligee refuses it, although the clerk is the agent of the chairman as to office bonds only. *Threadgill ex relatione Hough* v *Jennings,* 384

Vide *Administrators and Executors,* 5, 6.

BOUNDARY.

1. The *terminus* of a line must be either the distance called for in the deed, or some permanent monument, which will endure for years, the erection of which was contemporaneous with the execution of the deed. A stake is not such a monument, and evidence of its erection when

the land was surveyed, is not admissible to control the course and distance. *Reed* v *Shenck*, 65

2. Where the plaintiff and defendant claimed under two different grants, the junior of which called for the line of the elder, and a line of marked trees was found corresponding in age with the junior grant, held that this fact was not evidence of the boundary, of the elder grant. *Doe ex dem. Sasser* v *Herring*, 340

3. A question of boundary, discussed by HENDERSON, C. J. *Ingram* v *Colson*, 520

Vide *Color of Title*.

CA. SA. BOND.

Vide *Insolvent Debtor*, 1, 2.

CAPE FEAR NAVIGATION COMPANY.

Vide *Tolls*, 1, 2.

CASES APPROVED.

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McMillan v Hapley, 2 Car. Law. Rep. 89 doubted by HENDERSON, C. J. in Davidson v Frew, 3

Ridley v McGhee ante 2 vol. p. 40 doubted by RUFFIN, J. in Moore v Collins 126

Potts v Lazarus 2 Car. Law Rep. 83, doubted by HALL J. in Godley v. Taylor, 178

Potter v Stone, 2 Hawks 30 overrules in *ex parte*, Haughton 441

State v Morris 3 Hawks 388, disapproved by DANIEL, J. but approved by HENDER-

son, C. J, and Ruffin J. in State v Lipsey, 485

CASE STATED UPON AN APPEAL.

1. In an appeal to the Supreme Court, if the case does not contain *the facts* to which the Charge of the Judge was applied, however erroneous the charge itself may be as an abstract proposition, still the judgment must be affirmed. A judgment is not reversed because it does not appear to be right; it must de affirmed unless it appears to be wrong. *Pickett* v *Pickett*, 6
2. By Ruffin, J. An objection arising upon the statement of the *ore tenus* incidents at the trial, but not taken in the Court below, will not be heard in this court. *Atkinson* v *Clarke*, 171
3. By the same. Cases stated upon an appeal to this court, are similar to reports upon motions for a new trial in one respect, namely, that if upon the whole case, it is apparent the verdict is correct, the judgment will not be reversed, although there may be error in the point complained of. In other respects they are similar to bills of exceptions. *Ib.* 174
4. Where, upon the case stated, the judgment of the court below is correct, points which were intended to be presented, do not arise, and will not be examined; as when in trespass the plaintiff was in possession, and the defendant had no title, defects in that of the former, will not be noticed, he having recovered upon his possession. *Cobb* v *Herring*. 382
5. Where a judgment is rendered in the court below, upon a case agreed which is defectively stated, it will be reversed upon appeal. *Isbell* v *Stone*, 410

Vide Judge's charge 4.

CERTIORARI.

1. Where a cause is removed from one Superior Court to another, the latter has the right to issue a writ of *certiorari* to the former, directing a more perfect transcript to be certified. *State* v *Collins*, 117
2. By Henderson, C. J. The right of issuing writs of *certiorari*, is not founded on the circumstance that the Court from which it issues, is superior to that to which it is directed; but upon the principle, that courts have the right to issue any writ necessary to the exercise of their powers. *Ibid*, 120
3. By the same. Writs which give jurisdiction to a Court, must be returned; and both the writ and the return must appear upon the record; but this is unnecessary, where the writ was issued in the progress of a cause, and is merely auxiliary to its determination. A writ of *certiorari* to certify a more perfect record is of this latter description. *Id.* 121
4. Where an opportunity of appealing has been lost by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior Court, a *certiorari* will be granted without reference to the merits. *Colline* v *Nall*, 224
5. By Ruffin J. If an appeal be lost by the neglect of the applicant or of his agent, a *certiorari* will not be granted. It is otherwise when it is lost by the accidental inability of the applicant to give security for the appeal. *Ibid.* 226
6. By the same. But in such case it is not granted, when applied for merely to delay the other party, or to avoid a decision on the merits. And the applicant will also be laid under terms not to avail himself of a technical advantage arising from a mere informality. *Ibid.*
7. By Ruffin J. A summary judgment is properly rendered upon a bond given under the act of 1810 *(Rev. ch. 172)* upon sueing out a *certiorari*. *Speight* v *Wooten*, 327
8. Ignorance of the act of 1777 *(Rev. ch.* 115, § 79) requiring appeal bonds to be executed in the court where they were allowed, will not entitle the appellant to a *certiorari*. *Elliott* v *Halliday*, 377

An appellant, who has failed to file his appeal, is not entitled to a *certiorari* after a delay of three terms. He should apply at the first term, unless prevented by accident. *Erwin* v *Erwin*, 528

CLERK AND CLERK & MASTER.

1. Trespass will lie against a deputy clerk for wrongfully issuing an execution, under which the plaintiff's property was sold. *Coltrain* v *M'Cain*, 308
2. By Ruffin J. The principal only is liable for the mere nonfeasance of his deputy. But for an unlawful act committed by the deputy, *colore officii*, both are liable. *Ibid.* 309
3. The act of 1819 *(Rev. ch.* 990,) re-

quiring clerks to renew their bond, does not make their offices annual appointments, but gives cumulative securities for the performance of their official duties. *The Judges ex relatione, Oats* v *Bryan* . 451

4. By Henderson C. J. Nonpayment of money received by a clerk officially, may be assigned as a breach on any bond given by him. *Ibid.* 453

5. By the same Is the bond of a clerk & Master within the act of 1810 *(Rev. ch.* 800,) Qv. *Ibid.*

CLERK'S BOND.

Vide Bond 8-9. Clerk & Master. 3-4-5

COLOR OF TITLE.

Where the parties to a deed intended to convey only land to which the vendor had title, and also that it should set out the boundaries of the grant to him, but the land was especially surveyed and corners marked, and the deed made according to the survey, its courses are not to be controlled by those of the grant, and if it covers more land than the grant, it is color of title as to the excess. *Den ex dem, Ingram* v *Colson, et. al* 520

Vide Feme Covert—Fraudulent Conveyance 1-3—Limitation, Statute of 2

COMMISSIONS.

Vide Administrators and Executors 13—Appeal 3

CONSIDERATION.

1. A pecuniary consideration mentioned in the first part of a deed of bargain and sale, extends to any land conveyed in the deed to the person who paid that consideration. *Den on dem Jones* v *Ruffin,* 404

2. By Daniel J. A consideration of blood appearing upon a deed inoperative as a bargain and sale, will make it inure as a covenant to stand seized. *Den on dem, Hatch* v *Thompson,* 411

Vide Bills of exchange, and Promissory Notes 3

CONSTABLE.

1. A Constable who is charged with the collection of a debt, ought to see that good surety is given for the stay of execution, and if he being insolvent, becomes the surety, it is a breach of his official bond. *Governor ex relatione, Witherspoon* v *Davidson,* 361

2. The sureties of a Constable are not liable under the act of 1818 *(Re . ch.* 980) for his omission, without instructions to the contrary, to sue out an execution against an insolvent debtor. *The Governor ex relatione Fisher* v *Carroway Executor,* 436

COPARTNERSHIP.

An agreement between the owner of a vessel, and captain, that each party should pay certain expenses and divide the freight, with power to the captain to invest it on a joint account, constitutes a copartnership. *Cox* v *Delano,* 89

By Henderson, C. J. One who receives a portion of the profits, as his property, is a partner; but it is otherwise if the amount of profits is referred to, only to ascertain the amount of a debt due him. *Ibid* 90

Vide *Sheriff* 1.

COSTS,

Sureties for the prosecution of a suit, are bound for the costs accruing before, as well as after the execution of the bond. *Wilson* v *Hudspeth,* 57

COVENANT.

1. Executors having a power to sell lands of their testator, are personally bound by a covenant that they "executors &c. do forever warrant and defend &c." *Godley* v *Taylor,* 178

2. When an action was brought upon a covenant of quiet enjoyment, made by a decedent, and the eviction took place more than seven years after his death, *it was held,* Ruffin J. *dissentiente,* that the action was not barred by the act of 1715 *(Re . ch.* 10, § 7) requiring claims to be preferred within seven years after the death of a decedent. *Ibid.*

3 By Ruffin, J. The mere existence of a better title, without an eviction under it, does not entitle the bargainor to recover upon a covenant of quiet enjoyment. *Grist* v *Hodges,* 200

4. By the same But the existence of a better title; accompanied with actual possession, is a breach of a covenant of quiet enjoyment in a deed executed after the possession commenced under that title; and the bargainor need not bring an ejectment, to entitle himself to recover. *Ibid.*

5. By the same. Where the vendee is evicted in his life time, an action for this breach of the covenant of quiet enjoyment is properly brought after his

death by his executor, and does not descend to his heir. *Ibid.* 201

COVENANT TO STAND SEIZED.

Vide *Consideration*, 2.

DAMAGES.

1. Although the rule of damages upon an eviction from a particular estate may differ from that upon an eviction of the fee, yet when the deed conveys a life estate, and the whole interest was lost without any enjoyment by the vendee, he is entitled to recover his purchase money and interest. *Grist* v *Hodges*, 198

2. By Ruffin, J. Where the verdict exceeds the amount of damages laid in the writ, it is fatal in arrest of judgment unless the plaintiff remit the excess. But by the acts of 1790 & 1824, (*Rev. ch.* 318 & 1233) the plaintiff may in this court amend his writ. *Ibid*, 203

Vide *Bills of exchange, & Promissory Notes*, 4—*Debts, Action of*, 5—*New Trial*, 2

DEBT, ACTION OF.

1. By Henderson, C. J. In debt, the plaintiff may recover less than he demands, but the proof must agree with his allegations. *Waugh & Isbell* v *Chaffin*, 101

2. In debt on the act of 1778 (*Rev. ch.* 134) for marrying a couple without a license, if the writ demand £50, the penalty imposed by the act, and the jury find a verdict of £24 10, the sum to which the penalty is scaled, it is a variance for which the judgment will be arrested.—*Dowd* v *Seawell*. 185

3. By Ruffin, J. In debt the exact sum demanded in the writ need not be found by the jury, when from the nature of the demand, it is uncertain. But where the contract as stated in the declaration, fixes the amount due, the verdict must agree with the writ, or the judgment will be arrested. Not because a specific sum is claimed, but because there is a variance between the declaration and the proof.—*Ibid.*

4. By the same. The same principle applies to actions of debt on penal statutes. If the statute inflicts a penalty to be measured by reference to some uncertain standard, the verdict stands well with the declaration, although they do not agree. But if the penalty be certain, the very sum demanded by the writ, must be found by the jury. *Ibid.* 187

5. By the same. Damages cannot be recovered in debt on a penal statute, but it is not error to demand them. *Ibid.* 188

Vide *Limitation, Statute of*, 3.

DEED.

Two parties may adopt the same seal, and in that event it is the deed of both, otherwise it is the deed of one, and the simple contract of the other. But the question whether both parties adopted the same seal, is one for the jury, not for the judge. *Yarborough* v *Monday*, 420

Vide *Consideration*, 1—*Estate for life—Estoppel* 2-3-4—*Mortgage* 3-5—*Slaves* 2.

DEED OF GIFT.

Vide *Slaves* 1-3.

DEVASTAVIT.

Vide *scire facias* 3.

DETINUE.

Vide *Administrators and Executors*, 14—*Pleas and Pleading*, 1.

DISCRETIONARY POWERS.

Vide *Appeal*, 1-2-4—*Trial.*

DISTRIBUTION SHARE.

By Henderson, C. J. Courts of law afford no remedy for a distribution share, because their forms were fixed before the right to distribution was given. But the right being now given by statute, it is recognized in courts of law. *Holmes* v *Hall*, 100

DIVORCE.

1. Fraud in the contract of marriage, to entitle a party to a divorce, must consist of something more than mere concealment of defects. There must be such misrepresentations as would deceive a person of ordinary prudence; and where the husband, at the marriage, might have known that his intended wife was pregnant, and five months afterwards, she had a mulatto child; it was held that he was not entitled to a divorce. *Scroggins* v *Scroggins*, 535

2. The construction of the act of 1827, *ch.* 17, giving the superior court exclusive jurisdiction in all cases of divorce, stated by Ruffin, J. *Ibid.*

Where a man was induced to marry a woman by her representing to him that

a child she had was his, and that as to all the world but him, she was virtuous, and after the marriage he discovered that the child was black; it was held RUFFIN, J. *hesitante*, that he was entitled to a divorce if the color was so indistinct as to mislead a man of ordinary prudence—or if the child had been carefully kept from his view. *Barden* v *Barden*, 548

By RUFFIN, J. A case of this kind is a concession to the deep rooted prejudices of the community on this subject. *Ibid.*

By the same. The act of 1827 *ch.* 19 giving the superior courts jurisdiction in cases of divorce, is retrospective in its operation. *Ibid.*

DOWER.

A sale of land under process of execution defeats the estate of the defendant, and bars the dower of his widow, although the purchaser does not take his deed until after the assignment of dower. *Den ex dem of William Davidson* v *Ann Frew*, 3

EFFECTS.

The treaty of 1782 between the United States and the Netherlands provides, that the subjects of either party may dispose of their *effects* by testament and that their heirs shall receive succession *ab intestato*, although not naturalized. *It was held*, that the word *effects*, included real as well as personal estate. *Trustees of the University* v *Miller*, 188

EJECTMENT.

Vide *Alien* 2—*Arbitration and Award* 1—*Tenant in Common* 3.

ESCAPE.

Where a sheriff executes a writ, and permits the defendant to go at large, under a promise to give bail to a deputy; the latter is not liable to the sheriff for an escape of the defendant. *Dowell* v *Vannoy*, 23

Vide *Bail*, 7.

ESTATE FOR LIFE.

A deed to the children of A, reserving to him the use and benefit of the land, vests in him an estate for life. *Den on dem, Hatch* v *Thompson*, 411

ESTATE IN FEE.

Vide *Grant* 1-2.

ESTOPPELS.

1. By HENDERSON, C. J. Estoppels which arise from the mere act of a party, and from which a conclusion of law is inferred, are not favored. *Yarborough* v *Harris*, 41
2. Neither party to a deed of bargain and sale is estopped to show that one of the bargainors was a *feme sole*; although the deed recites that she was covert. *Brinegar* v *Chaffin*, 108
3. By HENDERSON, C. J. A party to a deed is not estopped by a recital, unless the fact recited be the moving cause of the execution of the deed. *Ibid.* 109
4. By HENDERSON, C. J. If any interest however small, passes by a deed, it creates no estoppel. *Mobley* v *Runnells*, 306
5. When, to debt on a bond, for the payment of purchase money, the defendant pleaded performance, and offered in proof of this plea, an acknowledgment of payment; and a release in a bill of sale: It was held that as he had not pleaded the release specially, it was mere evidence, and the plaintiff was not estopped to prove the contrary. *Woodhouse* v *Williams*, 508
6. By HENDERSON, C. J. He who relies on an estoppel, must plead it specially, or the jury may find the truth. *Ib.* 509
7. By the same. But if from any cause, the estoppel cannot be pleaded, the jury are bound by it. *Ibid.*

Vide *Sheriff's Sale*, 3.

EVIDENCE.

1. By RUFFIN, J, *arguendo*. Declarations of a deceased tenant, made during his tenancy, as to the nature of his possession, are evidence in controversies between his landlord and others. But this rule has its foundation in necessity, and does not apply where the tenant is alive, or where the declarations were made after the tenancy had ceased. *Pickett* v *Pickett*, 7
2. By RUFFIN, J. A plat made on an order of survey in one cause, is not evidence on the trial of another between different parties. *Simpson* v *Blount*, 36
3. To let in secondary evidence, the best evidence of the loss of the original document, that the nature of the case admits

of must be produced. *Dumas* v *Powell*, 103

4. Evidence that the prosecutor was actuated by malicious motives in preferring an indictment, is inadmissible, unless he is examined for the State. *State* v *Collins*, 117

5. Where the defendant in an indictment for *petit* larceny offers no evidence of character, the jury are to weigh the testimony as if they knew nothing against him, except what was disclosed on the trial. *Ibid.* 118

6. A note given for the payment of rent, and proved by the subscribing witness to have been executed thirty years *ante litem motam*, is competent evidence to prove the date of the *lessee's* possession. But it is otherwise as to a recent admission of the lessee. *Den on dem Blair* v *Miller*, 261

7. By HENDERSON, C. J. In no case is the declarations of the grantor admissible evidence for one claiming under him. *Sasser* v *Herring*, 343

8. By the same. Neither are the calls of a grant to him, though of ancient date, evidence for those claiming under him. *Ibid.*

Vide *Forgery* 3—*Parent & child*—*Retailers of spirituous Liquors*—*Slander* 2—*Trust* 1—*Witness* 1-2-3-4-5.

EXECUTOR DE SON TORT.

1. An administrator who holds property of the intestate, under a conveyance fraudulent and void against creditors, is liable to them as an executor *de son tort*. *Norfleet* v *Riddick*. 221

2. By HENDERSON, C. J. One who intermeddles with the goods of a decedent may be subjected as executor *de son tort*, although letters of administration afterwards issue. If the administration is committed to him, it entitles him to retain. *Ibid.*

3. By the same. But an intermeddling after a grant of administration, does not make an executor *de son tort*, because he is answerable to the administrator. *Ibid.*

4. By the same. If the intermeddler claims under a grant valid as to the administrator, but void as to creditors, the latter may from necessity subject him as an executor *de son tort*. *Ibid.*

5. One who sets up a claim to goods of an intestate, under a fraudulent conveyance, and thereby injures the sale of them, does not render himself executor *de son tort*. *Barnard* v *Gregory*, 223

6. Goods which were the property of a decedent, cannot be seized in the hands of his donee, under a judgment against his executor. If the creditor seeks to subject them, he must charge the donee as executor *de son tort*. *Bayner* v *Robertson*, 439

EXECUTOR.

Vide *Administrator & Executor*.

EXECUTION.

1. By RUFFIN, J. *arguendo*. There is no relation against the State, between executions in its favor, and that of a subject. The first has a preference, unless the debtor's goods have been actually sold under the process of the subject, before that of the State is delivered. *Hoke* v *Henderson*, 12

2. An execution is an entire thing, and must be completed by the hand which begins it. Where a *fi. fa.* was levied by one sheriff and a *venditioni exponas* issued to his successor, it was held that the latter could do no official act under the writ, and was not entitled to commissions. *Saunderson* v *Rogers*, 38

3. By RUFFIN, J. A levy vests a property in personals in the sheriff, to which his executor succeeds. Upon his death or resignation, a *distringas* against him, or his executor, is the proper process. *Ib.*

4. By the same. But the successor upon the death of a sheriff must at his peril, take notice of a prisoner in custody upon a *capias ad satisfaciendum*. *Ibid.*

5. Where an original *fi. fa.* issued to one county and an alias issued to another, a sale by the defendant of his property situated in the latter county, made while the first writ was in the hands of the sheriff, is valid. *Hardy* v *Jasper*, 158

6. By RUFFIN, J. In England, lands are bound by the *judgment* in suing out an *elegit*; and therefore *all* the lands owned by the defendant at its rendition, are liable for its satisfaction. But here lands are bound only by the *fi. fa.* from its *teste* and sales made after that time, of land situated where the writ does not run, are valid. *Ibid.*

7. By the same. An *elegit* may be sued out in this State. *Ibid.*

8. By Ruffin, J. *It seems* that a *fi. fa.* not taken out of the office, does not amount to a waiver of a previous levy. *Atkinson* v *Clarke*, 171

9. Where the sheriff has two writs of *fi. fa.* in favor of the same plaintiff, one against a principal debtor alone, and another against the same debtor and a surety, and raises money by a sale under both writs, it is to be applied *pro rata* to both; and neither the sheriff or the plaintiff can, by a subsequent application, affect the right of the surety to have the judgment against him discharged *pro tanto*. *Hill* v *Child*, 265

10. By Ruffin, J. An execution *de bonis propriis* where the judgment affects the assets only, is void. And the fact that the costs for which the administrator was liable, were included in the execution, does not render it valid. *Coltraine* v *M'Cain*, 308

11. The estate of one who holds in trust for creditors, with a resulting trust for the grantor, is not within the act of 1812 (*Rev. ch.* 830) subjecting equitable interests to sale by execution. *Mordecai* v *Parker*, 425

Vide *Executory Devise* 2—*Judgment* 3—*Tenant in common* 2—*Trespass* 1.

EXECUTORY DEVISE.

1. A devise to two, but if "either of them die, leaving no issue, that the whole should go to the survivor" is a good executory devise—and the devisees take as tenants in common in fee, with a contingent limitation to each of them, of an estate in severalty. *Southerland* v *Cox* 394

2. By Daniel, J. An executory devise in land is not destroyed by a sale under an execution against the first devisee. *Ib.*

3. By the same. An executory devisee has no right of entry until the contingency happens upon which his estate vests. *Ibid.*

FEME COVERT.

By Hall, J. Is the deed of a *feme covert*, without a private examination, colour of title where her coverture appears upon its face? Qu. *Den ex dem, Cloud* v *Webb*, 317

Vide *Estoppel* 2—*Legacy* 2

FISHERY.

1. Although by the acts of 1715 and 1777, (*Rev. ch.* 6 & 114) the beds of rivers and creeks are not subject to entry, yet where the river or creek is not navigable, in the ordinary meaning of the term, the owners of the banks have a several fishery opposite their land, to the middle of the stream. *Ingram* v *Threadgill*, 59

2. By Hall, J. It seems that a fishery in a river which is not affected by the ebb and flow of the tide, but which is in fact navigable, belongs to the riparian proprietor. *Ibid.*

FORGERY.

1. In the act of 1801 (*Rev. ch.* 572) to prescribe the punishment for forgery, the words "shall show forth in evidence any forged deed" &c. are confined to the exhibition of it as evidence upon a judicial proceeding, and are not equivalent to the words "utter and publish" in the statutes against counterfeiting. *State* v *Britt*, 122

2. The forgery of an order for the delivery of goods is within the act. *Ibid.*

3. By Ruffin, J. One found in possession of a forged order in his own favor, is presumed either to have forged it, or procured it to be forged until the contrary appears. *Ibid.*

FORNICATION AND ADULTERY.

Under the act of 1805, (*Rev. ch.* 684,) "to prevent vice and immorality," an indictment must charge that the man and woman had not intermarried. *State* v *Aldridge*, 331

FRAUDULENT CONVEYANCE.

1. By Ruffin, J, *arguendo*. Until the right of entry of a creditor accrues, a fraudulent deed is void to all purposes as against him, whether offered as title, or as colour of title. But after a sale by the creditor, if the possession of the fraudulent vendee be adverse to the purchaser, his fraudulent deed then becomes colour of title, and may be perfected by subsequent possession. *Pickett* v *Pickett*, 6

2. By Ruffin, J, *arguendo*. A conveyance fraudulent as to one creditor, is void as to all creditors. *Hoke* v *Henderson*, 12

3. A fraudulent deed is inoperative when offered as colour of title, as well as when offered as title itself. But after a sale

under a creditor's execution, it is colour of title against the purchaser. *Ibid.*

4. The statute of 13th Elizabeth being intended to protect creditors, a *bona fide* purchaser from a fraudulent vendee has no title against the creditors of the vendor. But the 27th Elizabeth being intended for the benefit of purchasers, the first *bona fide* purchaser whether from the fraudulent vendor or vendee is within its operation. *Ibid.*

5. A voluntary conveyance to a child, made by an insolvent, is *ipso facto* void, as to pre-existing debts. *Morgan* v *McLelland*, 82

6. An assignment made by an insolvent of all his estate, whereby some of his creditors are preferred, with a stipulation that the property shall remain in his possession, until a sale should be directed by a majority of his creditors named in the deed, is not in law fraudulent upon its face, so as to authorize the court to pronounce it void; but its validity must be submitted to a jury upon proof of the actual fraudulent intent. *Moore* v *Collins*, 126

7. By HALL, J. Assignments made by insolvents, whereby a preference is given to one class of creditors, are not founded in morality; and were the question *res integra*, would be declared fraudulent. *Ib.*

8. By RUFFIN, J. A creditor may in a general assignment of his property prefer one debt to another; and although the *effect* of this preference may be to delay a creditor, yet if such delay was not the *intent* of the debtor, the deed is valid. *Ibid.*

9. By the same. An assignment which conveys property for the purpose of paying specified debts, with an express resulting trust to the assignor, is not on that account fraudulent upon its face.—But if the resulting trust is more valuable than the debts secured, it is a circumstance from which the jury may infer a fraudulent intent. *Ibid.*

10. A deed made for the purpose of indemnifying a surety against a responsibility, created as a pretence for making the deed, and thereby to secure the use of the property to the debtor, is fraudulent. *Leadman* v *Harris*, 144

11. By RUFFIN, J. Where the fraudulent intent is made to appear, by evidence extrinsic of the deed, it is a question for the jury. But what is a fraudulent intent is a question of law. *Ib.*

12. By the same. A deed made to secure a true debt, but for the real purpose of enabling the debtor to continue in the use and enjoyment of the property conveyed, is fraudulent and void. *Ibid.*

13. Where A conveyed his estate to a trustee to secure B his surety, who agreed to purchase the estate at a sale by the trustee, and upon a resale after indemnifying himself, to hold the surplus for C, another creditor of A: It was held that a conveyance by B of the surplus to satisfy C, was not voluntary, and fraudulent as to his creditors, although there was no written memorandum of the agreement between him and A. *Den ex dem Jones* v *Ruffin*. 404

14. Where a father in pursuance of a family arrangement, conveyed part of his property to a daughter, and the residue to a son, upon condition the latter should pay his debts, the son is bound as a party to the deed to the daughter, although it is void as to the creditors of the father; and if the son takes an assignment of a judgment against the father, and buys the property of the daughter under it, he acquires no title. *Waller* v *Mills*, 515

15. By RUFFIN, J. A settlement whereby the property of a father is vested in a son, and the latter charged with the debts of the former, is void as to creditors.—*Waller* v *Mills*, 515

16. By the same. Neither party to a fraudulent conveyance can be aided by a court of justice. *Ibid.*

Vide *Mortgage* 2-6—*Scire facias* 1-2—*Sheriff's Deed*, 2

GAMING.

A retailer of spirituous liquors is not an ordinary keeper within the act of 1801 (*Rev. ch.* 581) to prevent excessive gaming, and is not indictable under that act for permitting unlawful games to be played at his house. *State* v *Hix*, 116

GARNISHMENT.

In a proceeding on a garnishment, under the act of 1793 (*Rev. ch.* 389) it is unnecessary for the plaintiff to reply to the answer of the garnishee on oath, where the garnishment admits the possession of property received from the defendant,

but sets up a distinct title. *Cowles* v *Oaks*, 96

GRANT.

1. The word *heirs* is absolutely necessary in a grant, to create a fee, as well as in a deed at common law, as in one operating under the statute of uses. *Roberts* v *Forsythe*, 26
2. By HALL J. A life estate is not enlarged into a fee, either by a warranty in fee, or by a covenant for quiet enjoyment to the grantee and his heirs. *Ibid.*

Vide *Boundary* 2—*Color of Title*.

GROOM.

Vide *Master and Servant*.

GUARANTY.

1. By RUFFIN J. Where the liability of a party is not direct, but collateral, and dependant upon the default of another, he must be notified of a default before he can be charged. *Grice* v *Ricks* 62
2. By the same. A guarantor is entitled to notice, although to charge him the same strictness in giving it is not required as in the case of an endorser. *Ibid.*
3. A guaranty of "a note and judgment against A. & B," is satisfied by a joint note of both, upon which judgment has been entered against one—*Smith* v *Morgan*. 511
4. By HENDERSON C. J. An undertaking by the guarantor to assist in the collection of a debt he is bound for, does not justify laches in the party guaranteed. *Ibid.*

GUARDIAN.

Under the act of 1816 (*Rev. ch.* 925) a guardian is not authorized to recover compound interest, unless the ward can demand it of him. *Wood* v *Brownrigg, Ex'r.* 480

Vide *Administrators and Executors*, 15, 18.

GUARDIAN BOND.

Vide *Bond*, 10, 11, 12, 13, 14.

HUSBAND AND WIFE.

1. By HENDERSON C. J. Where the husband sues for an injury to his marital rights, he must prove the solemnization of the marriage. But in those cases, in which *ne unques accouple* is not a proper plea, it may be inferred from circumstances. *Brinegar* v *Chaffin*, 108
2. The husband acquires by marriage no estate in the land of his wife, of which he is not actually seized. And when the wife has a vested remainder in lands, a sale, in the lifetime of the particular tenant, of the husband's interest passes nothing to the purchaser. *Gentry* v *Wagstaff*, 270

INQUEST OF OFFICE.

Vide *Alien* 1, 2, 3, 4.

INSOLVENT DEBTOR.

1. The defendant in a *Ca. Sa.* bond, given under the act of 1822 (*Rev. c.* 1131) is bound to attend at every term until the cause is finally disposed of. *Arrington* v *Bass*, 95
2. Under the act of 1822 (*Rev. ch.* 1131) for the relief of insolvent debtors, the sickness of the surety is no excuse for the default of the principal. *Speight* v *Wooten*, 327
3. A discharge of an insolvent, under the act of 1822 (*Tay. Rev. ch.* 1131) protects him from arrest, by those creditors only, who had notice of his intention to apply for it. *Crain* v *Long*, 371

INTEREST.

Vide *Guardian*.

JOINT TENANTS.

Joint tenants of a chattel have equal rights to its possession, and cannot maintain trover against each other unless the joint property is destroyed. But a disposition of a perishable article by one joint tenant, which prevents the other from recovering it, is equivalent to its destruction. *Lucas* v *Wasson*, 398

JUDGE'S CHARGE.

1. Where evidence proper for one purpose was, by the counsel who introduced it, urged to the jury as proof of a fact to which it is incompetent, and the counsel on the other side replied to this argument, but moved for no specific instructions on this head from the bench, it was held that the Judge committed no error in not noticing it in his charge. *Simpson* v *Blount*, 34
2. In mixed questions of law and fact, a judge is not bound to charge the jury upon a supposed state of the facts, unless moved to do so. *Governor upon the relation of Fisher* v *Carroway, Ex'r.* 436
3. When a Judge in his charge, did not repeat all the testimony but only such

parts of it as he thought would aid the jury in finding their verdict, it was held DANIEL J. *dissentiente* to be correct. And *per* RUFFIN J. and HENDERSON C. J. that part of the act of 1796 (*Rev. ch.* 452) directing the conduct of judges in charging juries, which forbids a judge to express his opinion as to the weight of evidence, introduces a new rule. The other part, directing him to state to the jury the facts given in evidence is declaratory that his discretion in that respect, was not affected by the prohibitory clause. *State* v *Lipsey*, 485

4. Where in the court below, a new trial was moved for, because the judge expressed an opinion to the jury on the weight of evidence, and the case certified with the record, stated no instance in which this had been done, but that the judge was unconscious of having done so, it was held that this Court having no power to ascertain the fact could not reverse the judgment. *Ibid.*

Vide *Case stated on appeal* 1—*New Trial* 4—*Verdict* 2. 4.

JUDGMENT.

1. A judgment *nunc pro tunc*, is not erroneous, although it appears that it should have been as of the present term, *Arrington* v *Bass*, 95

2. A judgment entered up as follows:—"Former judgments and retainer admitted; judgment confessed for, &c. to be satisfied when the money is collected, or in notes beforehand," is a judgment *quando*. *Waugh & Isbell* v *Chaffin*, 101

3. By RUFFIN, J. Defects in judgments may be amended even after a writ of error; and executions may also be amended after they have been acted upon, so as to render them a justification to the officer where otherwise they would not be. *Bender* v *Askew*, 149

4. By the same. Judgments by defaults, signed by the attorney without an actual adjudication by the court, may be set aside at any time, even after the term at which they are entered. *Bender* v *Askew*, 149

5. By the same. After a judgment by default has been set aside, another court cannot inquire collaterally, whether it was set aside properly or not. *Ibid.*

6. By HENDERSON, C. J. A judgment cannot be collaterally impeached for error if rendered according to the course of the court; however erroneous, it is valid until revised. *White* v *Albertson*, 241

7. By the same. Although satisfaction of a decree against an executor, who has fully administered, can now be had out of the lands of the testator, only upon a bill against the heir, yet a sale under an order made upon a *sci. fa.* is valid. *Ib.*

8. By the same. A judgment by *nil dicit*, against an infant heir is not void but only erroneous. *Ibid.*

9. By the same. Where judgment was rendered against an infant upon process issuing against his guardian, who appeared for the infant, this appearance, although irregular, is taken to have been sanctioned by the court. *Ibid.*

10. By the same. A judgment is void when rendered contrary to the course of the court, but if improperly rendered against a party when it should have been in his favor, it is only erroneous. *Ibid.*

11. A judgment on a *sci. fa.* against an heir, when his name is neither set forth in the writ, nor in the return of the sheriff, is a nullity, and a purchaser at an execution sale under it, acquires no title. *Den ex dem, Bonner* v *Tier*, 533

Vide *Arbitration & Award*, 2-3—*Certiorari*, 7—*Justices Judgment*, 1-2—*Malicious prosecution* 2—*Pendente lite*, 2 *Surety* 1-5—*Trespass* 1.

JUDGMENT AGAINST LANDS DESCENDED.

Where the heir has lands descended from both parents, a creditor cannot sell that descended from the mother under a judgment against that descended from the father, although the mother held as devisee of the father. *Trotter* v *Selby*, 374

JUSTICES' JUDGMENT.

1. By HENDERSON C. J. In reviewing a judgment rendered by a Justice of the Peace, every fact necessary to support it is to be taken as found, unless the contrary appear. *Haines* v *Dalton*, 91

2. A judgment of a single magistrate, for a sum above his jurisdiction is void, and no action can be maintained on it. *Jones* v *Jones*, 360

Vide *Administrators and Executors*, 7

JUSTICES' JURISDICTION.

1 A Justice of the Peace can try the truth of any plea, which if sustained would bar an action within his jurisdiction. *Haines* v *Dalton*, 91

2. A general jurisdiction is not ousted, except by plain words, or a necessary implication; and notwithstanding the act of 1828, ch. 9, giving a Justice of the Peace, jurisdiction in cases where the debt and interest exceed one hundred dollars, and the act of 1826, ch. 12, authorising the Courts to dismiss a suit for less, yet as there are no words in those acts ousting the jurisdiction of the Superior Courts in cases of debt for one hundred dollars and interest, it remains. *Griffin* v *Ing*, 358

Vide *Administrators and Executors* 7

LANDLORD AND TENANT.

Vide *Evidence* 1—*Possession* 2.

LARCENY.

1. Where a shawl was dropped in an exhibition room, and picked up by the defendant, placed in a conspicuous situation, and afterwards appropriated to his own use, it was held that he was not guilty of larceny. *State* v *Roper* 473

3. Can larceny be committed of goods that are lost? Qu. *Ibid.*

Vide *Evidence* 4, 5.

LAWS OF OTHER STATES.

Vide *Lex loci contractus* 3.

LEGACY.

1. An assent to a legacy by an Executor, may be presumed from his holding the legacy for five years, claiming it as next of kin to the legatee, and selling it as his own. *Merrit* v *Windley*, 399

2. By Daniel J. An assent to a legacy of a slave by the executor of a will made by a *feme covert* under a power, does not vest the legal title in the legatee.—And this although the trustee in the marriage articles be also the executor, unless he assent by deed, or by actual delivery. *Ibid.*

LEX LOCI CONTRACTUS.

1. The law of the country where a contract is made, is the rule by which its validity, its meaning and its consequences are determined, *Watson* v *Orr*, 161

2. But where a law of Virginia gives *bona fide* purchasers from a bailee, who has had possession more than five years, a title against the bailor, unless the bailment be registered, if a purchase, pending a suit by the bailor against the bailee, would not be valid in Virginia, so neither would it be in this State, although the suit was pending in Virginia, and therefore was not notice to the vendee here. *Ibid.*

3. By Ruffin J. In construing the law of another State, the decisions of that State if known, are to be followed. *Ibid.*

LEVY.

Vide *Execution* 2, 3, 8—*Pendente lite* 1.

LICENSE.

An unsealed memorandum given by the owner of the land, stating that A, is the owner of a house upon the premises, and authorising its removal, is a mere license to enter, and is revoked by a subsequent conveyance to B. *Whitaker* v *Cawthorne*, 389

LIMITATION, STATUTE OF.

1. By Hall J. The statute of limitation never begins to run until a cause of action has accrued, as well as until there is a claimant in existence. *Godley* v *Taylor*, 178

2. Where four sisters were seized of a tract of land in coparcenary, and three of them who were of full age, conveyed their shares in fee, and the fourth who was *covert*, and an infant, joined with her husband in a deed conveying to the same vendee all their interest in the land, to which the *feme* was not privately examined, and the vendee remained in possession of the whole tract, and enjoyed all the rents and profits for forty years to the husband's death, and fifteen years after his death, it was held that admitting the deed of the *feme covert* to be colour of title, the vendee and the *feme covert* were tenants in common, and that his possession was not adverse to her. *Den ex dem. Cloud* v *Webb*, 317

3. In debt upon simple contract, a replication of a mere promise within three years is no answer to a plea of the act of limitations. *Morrison* v *Morrison*, 402

4. Where A owed B, and made him a payment, taking his acknowledgment with a promise to refund in case the payment exceeded the amount due, and upon a reference the arbitrator found that B.

was overpaid, it was held in an action upon the acknowledgment, that the statute of limitations did not begin to run until the award was made. *Falls* v *McKnight*, 421

5. Is a submission to arbitration, a waiver of the statute of limitations. Qu? *Ibid.*
6. When the plaintiff to rebut the plea of the statute of limitations proved that the defendant's testator in his last sickness sent for him, and expressed great anxiety to adjust an unsettled account between them, and upon being disappointed, made entries of credits to which he was entitled, but no admission by him of a balance due the plaintiff was proved; it was held, DANIEL J. *dissentiente*, and HENDERSON, C. J. *dubitante*, that the evidence was not sufficient to authorize a verdict for the plaintiff, but that it should be left to the jury, with instructions to find for the defendant unless the testimony proved the testator to have been willing that the account should be settled after his death. *Ballenger* v *Barnes*, 460

Vide *Covenant* 2—*Power* 1—*Qui tam actions*—*Sheriff's Sale* 1.

MALICIOUS PROSECUTION.

1. The plaintiff cannot recover in case for a malicious prosecution without producing the record of his acquittal. *Williams* v *Woodhouse*, 257
2. By HALL J. Judgments cannot be impeached collaterally; and while they are unreversed, they are conclusive as to their legal effects. And where the defendant in an indictment was convicted of the charge, he cannot in any form of action recover against the prosecutor, although he shews that the conviction was the result of conspiracy and perjury. *Ib.*
3. Probable cause is such a suspicion as would induce a reasonable man to commence a prosecution, and where a witness swore, that a magistrate upon the return of a state warrant, said "that he would commit the defendant unless &c;" and the magistrate had in fact said he "would bind the defendant over unless &c." it was held, that the variance did not constitute probable cause for a prosecution for perjury. *Cabiness* v *Martin*, 454

MASTER AND SERVANT.

No power can be inferred from the relation of master and servant, whereby the servant can bind his master. Hence a groom has not the right to vary from his employer's terms, unless a special authority be proved. *Moore* v *Tickell*, 244

MEMORANDA.

Vide *page*. 484

MORTGAGE.

1. A mortgagor of a chattel, having the right of possession for a stipulated period cannot after the expiration of that period, dispute the title of the mortgagee, and the same rule applies to his vendee. *Holmes* v *Hall*, 98
2. A *bona fide* vendee, who pays his purchase money to satisfy an outstanding fraudulent mortgage, and takes a deed from the mortgagor and mortgagee is not affected by the fraud. *Wall* v *White*, 105
3. By HENDERSON, C. J. Where the mortgagor and mortgagee join in a bargain and sale before the estate of the latter has become absolute, the bargainee is in under the mortgagor. *Ibid.*
4. By the same. Where the mortgage debt is paid within the period limited by the deed, the estate of the mortgagee is thereby divested, and he has nothing but a possession, which is defeated by the entry of the mortgagor or his vendee. *Ibid.*
5. By the same. In that case upon an entry by the bargainee of the mortgagee and mortgagor, the bargain and sale becomes the deed of the mortgagor, and the confirmation of the mortgagee *Ibid.*
6. By the same. In expounding the statutes against fraudulent conveyances, the mortgagor is considered the owner of the estate, and the mortgagee, but an incumbrancer. *Ibid.*

NAVIGABLE STREAMS.

By HALL J. The ebb and flow of the tide is not a proper criterion to determine whether a river of this State is navigable. *Ingram* v *Threadgill*, 59

Vide *Fishery* 1—2.

NEW TRIAL.

1. When there are several counts in the declaration, and on one of them improper evidence was received, if the party against whom the evidence was offered obtained a verdict on that count, he has no right to a new trial on the other, on which the verdict was against him. *Young* v *Hairston*, 55

2. By Hall J. Upon a rule for a new trial on the ground of excessive damages, the decision of the Superior Court is conclusive. *Ibid.*

3. By Ruffin J. Where the defendant must finally prevail, a new trial will be granted, although the judgment below was for the plaintiff and he appealed.—*Mordecai* v *Parker*, 425

4. Where on a trial for murder, the prisoner proved his general peaceable demeanour, and the judge informed the jury, that evidence of character was entitled to but little weight, where facts were positively sworn to, and it is doubtful from the case, whether this instruction referred to the fact of killing or the amount of provocation, a new trial was granted. Ruffin J. *dissentiente*. 485

NOTICE.

By Ruffin J. Upon questions of legal title, notice has no influence; it does not affect a valid one, nor is a defective one aided by the want of it. *Watson* v *Orr*, 161

Vide *Guaranty* 1—2.

PARENT AND CHILD.

Where a child upon his arrival at full age continues to reside with and serve the parent, in an action to recover the value of those services the relation subsisting between the parties is a circumstance from which the jury may infer that they were gratuitous. *Williams* v *Barnes*, 348

PENDENTE LITE.

1. Where personal property was levied upon by the Sheriff, but not taken into his possession, and afterwards an action of detinue was commenced for the same property, against the original defendant, pending which it was sold by the Sheriff, held that the possession of the Sheriff related to the levy, and therefore did not commence *pendente lite*. *Haywood* v *Sledge*, 338

2. By Henderson C. J. The maxim *pendente lite nihil innoveter*, is not applicable to fraudulent judgments. *Ibid.*

Vide *Pleas and Pleading*, 1.

PERJURY.

An indictment for perjury charging that the defendant "being a wicked and evil person, and unlawfully and unjustly contriving &c. deposed &c," and concluded that the defendant "of his wicked and corrupt mind, did commit wilful and corrupt perjury," is defective even at common law, for not alledging that the defendant *wilfully* and *corruptly* swore falsely. *State* v *Carland*, 114

PLEAS AND PLEADING.

1. Where a *sci fa* on a judgment in detinue issued against a purchaser *pendente lite*, a plea that the defendant purchased at an execution sale against the original defendant, without averring that the title of the plaintiff, though good against the latter, is not good against his creditors, is bad. *Falconer* v *Jones*, 334

2. By Henderson C. J. But a plea that the judgment was confessed to defraud the creditors of the original defendant, is good upon general demurrer. *Ibid.*

Vide *Estoppel*, 5, 6, 7.—*Qui tam actions*.

POSSESSION.

1. By Ruffin J. Actual possession of land consists in exercising that dominion over it, and making that profit from it, of which it is susceptible in its present situation. But these acts must be characteristic of ownership. If at long intervals, and consistent with the acts of a trespasser they are not sufficient. *Simpson* v *Blount*, 34

2. By Henderson C. J. The rule that a tenant or bailee, cannot dispute the title of his landlord or bailor, without surrendering the possession, is founded in a principle of morality which does not permit possession to be retained, in violation of the faith upon which it was acquired. But if during possession under a bailment, the bailee is by act of law vested with an office, the duties of which require him to dispute the title of his bailor, he is remitted to the title thus acquired, and may without a breach of faith retain the possession. *Yarborough adm'r. of Harris* v *Harris*, 40

3. One having title to land, part of which is under cultivation, and part in woods unenclosed, is taken to be in actual possession of the whole tract. *Grist adm'r of Campbell* v *Hodges ex'r. of Clarke*, 198

Vide *Sheriff's Sale*, 2—*Tenant in common*.

POWER.

By RUFFIN J. *arguendo.* A power over an estate is regarded as the estate itself; and a possession adverse to that estate, will under the statute of limitations bar the power. *Pickett* v *Pickett.* 6

By RUFFIN J. *arguendo.* A Sheriff's deed is nothing but the execution of a power, and relates back to the power itself. *Hoke* v *Henderson,* 12

PRINCIPAL AND ATTORNEY.

Ordinarily, the act of an Attorney in a cause is taken to be the act of the party whom he represents. But where the assignor of a note stipulated, that it should be placed by the assignee in the hands of a particular attorney for collection, and by the act of that attorney, the interest of the assignor was injured, it was held in a question between the assignor and assignee, that the former was bound by the act of the attorney, and the fact that he had no redress against the attorney, did not discharge him. *Grice* v *Ricks,* 62

PRINCIPAL AND AGENT.

Vide *Usury* 7, 9.

PROCESSIONING.

The return of a processioner must set out the courses and distances in words at full length. And where the courses were expressed by abbreviations, and the distances in figures, the return was set aside, HENDERSON C. J. *dissentiente.*—*Cansler* v *Hoke,* 268

QUI TAM ACTIONS.

By RUFFIN J. In *qui tam* or popular actions, under *nil debet,* the plaintiff must prove his action to have been brought within the period of limitation; and when that plea is entered, a special plea of the statute of limitations presents an immaterial issue. *Dowell* v *Vannoy,* 43

Vide *Debt, Action of* 2, 4, 5.

RAPE.

In an indictment under the act of 1823, (*Tay. Rev. c.* 1229,) "declaring the punishment of persons of color in certain cases" it is necessary to charge that the assault was made with an intent to commit a rape. An allegation that the defendant feloniously attempted to ravish is insufficient. *State* v *Martin,* 329

RECEIPT.

Vide *Accord and Satisfaction.*

RECOGNIZANCE.

A recognizance is a specific lien, which is not lost by suing out a *fi fa.* *Hoke* v *Henderson,* 12

Vide *Sheriff's Deed,* 2.

RECORD.

The records of a court cannot be explained by parol testimony. *Wade* v *Odeneal,* 423

Vide *Removal of Causes,* 1.

REGISTRATION.

1. Where a deed of trust was duly proved, but by reason of the death of the register, was not registered within six months, but was registered as soon as a successor was appointed, it was held, RUFFIN, J. *dissentiente,* that the deed was available as if duly registered. *Moore* v *Collins & Rascoe,* 126

2. By HALL, J. Registration being required by law for the public benefit, and registers being officers of the public, if such officers are not provided, or if by their neglect a deed be not registered within the time prescribed, it is available without registration. *Ibid.*

3. By RUFFIN, J. An act required by law is not considered as performed, although the performance was prevented by the act of God. Hence, where a deed was not duly registered by reason of the death of the register, it passed no title to the vendee. *Ibid.*

4. Where a deed was proved, and before its registration the boundaries of another tract were inserted in it, it was held that evidence of that fact, did not impeach the deed, but that as to the tract, the boundaries of which were inserted after probate, the deed was unregistered. *Den ex dem, McLindon* v *Winfree,* 262

5. Notwithstanding the act of 1806, (*Rev. ch.* 701) requires deeds of gift for slave to be registered within one year of thei date, yet if registered within the time prescribed by the acts allowing longer time for that purpose, they are valid.—*Jones* v *Sasser,* 378

6. A registration of a deed of trust made upon proof of its execution by an attesting witness, who was interested under it, is valid. *Den on dem Jones* v *Ruffin,* 404

REMAINDER IN CHATTELS.

A remainder in chattels, after a life estate, cannot be created by deed. *Morrow* v *Williams*, 263

REMOVAL OF CAUSES.

1. By Henderson C. J. Where, upon the removal of a cause two contradictory copies of a record are certified, the contradiction can be reconciled by an inspection of the original record, by the Court to which it is removed. But where the transcripts are not contradictory; they form but one copy, and both may be used by the Court. *State* v *Collins*, 117
2. Rules made by consent after an order for the removal of a cause, but before it is removed, are not erroneous. *Den ex dem. Smith* v *Greenlee*, 387
3. An affidavit for the removal of a cause adjudged to be sufficient. *Ibid.*

Vide *Certiorari*, 1, 2, 3.

RETAILERS OF SPIRITOUS LIQUORS.

On the trial of an indictment under the act of 1816 *(Rev. c. 906,)* to prohibit the retailing of spiritous liquors by the small measure, it is incumbent on the defendant to show the existence of a license. *State* v *Morrison*, 299

Vide *Gaming*.

RIGHT OF ENTRY.

Vide *Executory Devise* 3.—*Fraudulent Conveyance* I.

SCIRE FACIAS.

1. The *scire facias* given by the act of 1806 *(Rev. c. 700)* to secure creditors against fraudulent conveyances by debtors, is dependent upon the original action of the creditor, and to sustain it the first judgment must be in force. *Wintz* v *Webb*, 27
2. By Ruffin J. In a *sci. fa.* under the act of 1806, suggesting a fraudulent conveyance and concealment of the property, and not that it has been wasted or used, upon a verdict for the plaintiff, a personal judgment against the defendant is erroneous. *Ibid.*
3. A *scire facias* suggesting a *devastavit* by an administrator does not survive against his Executor. *Conrad* v *Dalton* 258

Vide *Judgment*, 7, 9, 11.

SEAL.

Vide *Deed—Writ* 2—3.

SHERIFF.

1. The purchaser of partnership effects, under a *fi. fa.* against a co-partner, takes them subject to the accounts of the partnership and can only claim a share of the surplus, after payment of the debts. But the Sheriff is in no way affected by this equity between the purchaser and and the other partners. *Tredwell* v *Rascoe*, 50
2. A Sheriff, who was elected in June 1826 and who went out of office in June 1827, is bound to collect and account for the taxes due the Treasury in October 1827, altho' the tax lists were not handed him until after his office expired. *Slade* v *Governor*, 365
3. The vendee of land bound by a *fi. fa.* cannot maintain an action against the Sheriff, for selling that land under the writ, instead of the chattels of the defendant. *Mordecai* v *Parker*, 425
4. Such an action is personal to the defendant in the *fi. fa.* *Ibid.*
5. Sheriffs, although elected for one year, by the act of 1777, *(Rev. c. 118)* hold their office until the qualification of their successors. *Collins* v *Nall*, 457
6. Although Sheriffs are elected at stated terms of the County Court, they hold their offices, not from the Court at which they were elected, to the next court when an election takes place, but for one year. *Ibid.*

Vide *Bail* 7, 8.—*Escape—Execution* 2, 3, 4—*Usury* 6.

SHERIFF'S BOND.

Vide *Bond* 1, 2, 3, 4.

SHERIFF'S DEPUTY.

Vide *Escape*.

SHERIFF'S DEED.

1. By Henderson C. J. *arguendo*. A Sheriff's deed vests the title of land in the purchaser from the time of the sale. *Davidson* v *Frew*, 3.
2. Where a purchaser of land under an execution against a fraudulent vendor, neglected to take his deed from the Sheriff, and before its delivery the fraudulent vendee entered into a recognizance to the State, it was held that though between the State and a subject, there is no priority obtained by the latter, from the relation of his execution, when they are pursuing the estate of a common debtor, yet as the land was primarily liable to the

creditor of the vendor, the prerogative of the State did not operate, and that the Sheriff's deed related to the sale. *Hoke* v *Henderson*, 12

Vide *Power* 2.

SHERIFF'S SALE.

1. By RUFFIN, J. *arguendo*. If a purchaser at a sheriff's sale, neglect to take a deed for seven years, a possession with colour of title, adverse to the title conveyed by the sheriff, will bar the purchaser under the execution. *Pickett* v *Pickett*, 6
2. By HENDERSON, C. J. Actual possession is not necessary to the validity of a sheriff's sale. It is sufficient if the goods are subject to his control. *Treadwell* v *Rascoe*, 50
3. By HENDERSON, C. J. A sheriff can sell only such estates as the defendant in the execution can convey by deed passing an estate. Where the deed of the defendant would operate only by way of estoppel, a sheriff's deed conveys nothing. *Gentry* v *Wagstaff*, 270
4. By HENDERSON, C. J. A *fi. fa.* vests a property in goods seized under it in the sheriff, but as to land it confers upon him only a power to sell. Goods may therefore be sold by the sheriff under a previous levy without a *venditioni*; but a sale of land without such authority is inoperative. *Seawell* v *Bank of Cape Fear*, 279
5. By the same. If a sheriff has several writs against the same defendant, and does not sell under one of them, that writ cannot aid the title of the purchaser under the others, although the money arising from the sale, is applied to its satisfaction. *Ibid.*
6. By the same. Where a sheriff levies a *fi. fa.* on land and goes out of office, a *venditioni* must be directed to his successor. *Ibid.*
7. A sale of land under a *fi. fa.* made after the return day of the writ, but before it is returned, is valiid, although the sale be not opened on the return day, and then postponed. *Den ex dem. Mordecai* v *Speight*, 428
8. By RUFFIN J. Purchasers at a Sheriff's sale are not required to see that the Sheriff has complied with his duty. *Ibid.*
9. Where a Sheriff sells land for the taxes of two years, when he had a right to collect only those due for the last year, his sale is void, and his deed vests no title in the purchaser, *Den ex dem.—Douglas* v *Short*, 432

Vide *Dower*.

SLANDER.

1. Words which in themselves do not import a slanderous meaning, must, in declaring on them as slanderous, be rendered so by an *innuendo*, connected with an averment that they were spoken of the plaintiff. But if the words are in themselves slanderous, it is only necessary to aver that they were spoken of the plaintiff. *Britain* v *Allen*, 167
2. By HENDERSON C. J. In actions of slander, the *quantum* of malice is material in estimating the damages; and to establish that, evidence is admissible of words spoken by the defendant, not declared on; but the jury should be instructed as to the purpose for which the evidence is introduced. *Ibid.*

SLAVES.

1. A deed of gift for slaves which is not attested by a subscribing witness is void. *Atkinson* v *Clarke*, 171
2. An assignment of slaves, not under seal, is void unless accompanied by a delivery of possession. *Ibid.*
3. By HALL J. A gift of slaves made by an instrument not under seal, and unaccompanied by delivery, is void. *Morrow* v *Williams*, 263
4. Where A agreed to purchase a slave for B, but took the title to himself, and afterwards the slave being in the possession of B, the purchase money was tendered by him to A, who declined taking it, but did not disclose his title, held that the jury were properly instructed that they might from these facts infer a subsequent sale. *Eppes* v *McLemore*, 345
5. By RUFFIN J. A contract for the sale of a slave accompanied with possession by the vendee is valid. *Ibid.*
6. The act of 1794, (*Rev. c* 406) to prevent owners of slaves from hiring to them their time, does not subject the master to an indictment, the remedy being against the slave alone. *State* v *Clemons*, 472

STATUTES CONSTRUED, OR COMMENTED ON.

27th Eliz. *c.* 4, Wall v White 105
43d Eliz. *c.* 8, Barnard v Gregory, Executor, 229

1715 c. 2, s. 3, Pickett v Pickett, 6
" " " Hoke v Henderson, 12
" " s. 5, Ballenger v Barnes, 460
" c. 6, s. 3, Ingram v Threadgill, 59
" c. 7, s. 4, Morgan v McLelland, 82
" " " Leadman v Harris, 144
" " s. 4 & 6, Pickett v Pickett, 6
" " " Hoke v Henderson, 12
" " s. 6, Wall v White, 105
" c. 10, s. 7, Godley v Taylor, 178
1741 c. 28, s. 2, Collier v Neville, 30
" " " Dowell v Vannoy, 43
1762 c. 69, s. 7, Justices of Currituck v Dozier, 287
" " Justices of Chowan v Bonner, 289
" c. 114, s. 10, Ingram v Threadgill, 59
1777 c. 115, s. 19 Findley v Smith, 247
" " s. 20, Huggins v Fonville, 392
" " " Moody v Stockton, 431
" " s. 22, Granbury v Pool, 155
" " s. 61, Justices of Cumberland v Armstrong, 284
" " s. 86, Gardner v Lane 53
1777 c. 118, s. 1, Branch v Elliott, *et al.* 86
" " " Collins v Nall, 457
1778 c. 134, s. 5, Dowd v Seawell, 185
1784 c. 219, s. 6, Slade v The Governor, 365
" c. 225, s. 7, Atkinson v Clarke, 171
" c. 226, s. 4, Bonner v Tier, 533
1787 c. 276, s. 1, Wilson v Hudspeth 57
1790 c. 318, s. 2, Grist v Hodges, 198
1791 c. 341, s. 1, Threadgill v Jennings, *et al.* 384
1792 c. 365, s. 6, Cansler v Hoke, 268
1793 c. 389, s. 1&2, Cowles v Oaks, *Administrator*, 96
1794 c. 406, s. 1, State v Clemons, 472
" c. 415, s. 1, Eure v Eure, 206
1796 c. 452, s. 1, State v Lipsey, 485
1797 c. 474, s. 5, Seawell v Bank of Cape Fear, 279
1800 c. 547, s. 1&2, Douglass v Short, 432
1801 c. 572, s. 1, State v Britt, 122
" c. 581, s. 1, State v Hix, 116
1805 c. 684, s. 1, State v Aldridge, 331
1806 c. 700, s. 1, Wintz v Webb, 27
" c. 701, s. 1, Jones v Sasser, 378
1812 c. 830 s. 1, Mordecai v Parker, 425
1814 c. 879, s. 1, Morrison v Morrison, 402
1815 c. 897, s. 1, State v Patrick, 478
1816 c. 906, s. 2, State v Morrison, 299
" c. 925, s. 1, Wood v Brownrigg, 430
1818 c. 962, s. *Ex parte* Haughton, 441
" c 980, s 1&2 The Governor v Davidson, 361
" " " Fisher v Carroway, 436
1819 c. 990, s. 1, Oats *et al.* v Bryan, 451
" c. 1004, s 1&2 Howell v Barden, 442
1820 c. 1037, s. 1, Moore v Collins, 126
1821 (c. 1096, *Tay. Rev.*) Mordecai v Speight, 428
1822 (c. 1131, *Tay. Rev.*) Arrington v Bass, 95
" " " " Speight v Wooten, 327
" " " " Crain v Long, 371
" c. 1153, *Tay. Rev.* Mordecai v Speight, 428
1823 (c. 1229, *Tay. Rev.*) State v Martin, 329
1824, (c. 1235, *Tay. Rev.*) Grist v Hodges, 198
1826 (c. 12, *Pamphlet,*) Griffin v Ing, 358
1827 c 19, *Pamphlet,*) Scroggins v Scroggins, 535
1827 (c. 19, *Pamphlet,*) Barden v Barden, 548
1828 (c. 9 *Pamphlet,*) Griffin v Ing, 358

SURETY.

1. A judgment against a surety will not entitle him to maintain an action for money paid to the use of the defendant until it has been satisfied. *Hodges* v *Armstrong*, 253
2. By RUFFIN J. To enable a surety to recover for money paid to the use of his principal, he must prove an actual payment in satisfaction of his debt. *Ibid.*
3. By the same. In order to get the benefit of the security, upon payment of the debt, he must have it assigned to a trustee; or if bound collaterally, he may take the assignment directly to himself. *Ibid.*
4. By the same. If an assignment of the security is taken, the surety may have his redress upon it immediately in the name of the creditor. But while it is in force, the surety cannot maintain an action for the money paid for the assignment. *Ibid.*
5. Where a surety in a joint note paid it, but took no assignment from the creditor, of a judgment previously obtained upon it against the principal debtor, held

that the payment satisfied the judgment. *Sherwood upon the relation of the State Bank* v *Collier*, 380

6. By RUFFIN J. An assignment of a security to one of the parties to it, is a satisfaction—if it is intended to keep it on foot, the assignment should be to a stranger. *Ibid.*

Vide *Bond* 6—*Costs—Execution* 8.

TAXATION.

Vide *Bank Stock.*

TAXES.

Vide *Sheriff* 2—*Sheriff's Sale* 9.

TENANCY AT WILL.

Where the owner of land, agreed that A should cultivate it during his life, or as long as he pleased with a restriction as to a sale of it; held by HENDERSON C. J. and DANIEL J. that a tenancy at will was created, and that the estate might be determined by either party—by RUFFIN J. that no estate vested in A. *Den ex dem. Mhoon* v *Drizzle*, 414

TENANT IN COMMON.

1. By HALL J. The possession of one tenant in common, is the possession of another. *Den on dem. Cloud* v *Webb*, 317

2. By DANIEL J. A sale of the estate of one tenant in common under an execution against all, does not divest the estate of others. *Southerland* v *Cox*, 394

3. By DANIEL J. One tenant in common may declare for all the joint estate, and recover his proportion. *Den ex dem. Hatch* v *Thompson*, 411

Vide *Executory Devise* 1—*Limitation, Statute of*, 2—*Trespass* 2.

TENDER AND REFUSAL.

A bond for the delivery of specific articles can be discharged only by a delivery or a tender on the day specified. If they are cumbrous, the obligor may notify the obligee to appoint a place for their delivery, and if the latter neglects to attend upon the plea of tender, the obligor must prove, that he was there ready and able to make the delivery. *Mingus* v *Pritchett*, 78

TOLLS

1. A remedial statute is to be construed so as to advance the intention of the legislature, as when by the act of 1815 (*Rev.* c. 897) incorporating the Cape Fear Navigation Company, no power to collect tolls is expressly given, unless by that section which confers on the Company, all the powers which the 8th section of the act of 1812 (*Rev.* c. 848) gives to the Roanoke Navigation Company, and that section authorizes the latter Company to demand their tolls at the falls of Roanoke, it was held that the Cape Fear Navigation Company might demand theirs at any place on that river. *State* v *Patrick*, 478

2. By DANIEL J. A power of distress given a Navigation Company upon a refusal to pay their tolls is constitutional, the action of replevin being a remedy for its abuse. *Ibid.*

TREATY.

By HENDERSON C. J. Courts cannot judicially take notice what treaties with foreign countries are in force. This question must be determined by the Executive. *Trustees of the University* v *Miller*, 188

Vide *Effects.*

TRESPASS.

1. Where a judgment has been improperly entered up, the party suing out execution upon it, is a trespasser, if the Court subsequently set aside the judgment and execution. *Bender* v *Askew*, 149

2. Tenants in common cannot maintain trespass against each other; even after they have made a partition by parol.—*McPherson* v *Seguine*, 153

3. By RUFFIN J. Upon the death of the plaintiff in trespass *quare clausum fregit*, the suit must be revived by his executor and not by his heir. *Ibid.*

Vide *Appeal* 6—*Clerk and Clerk and Master* 1.

TRIAL.

The Court at the request of the jury, may in its discretion permit a witness who has been once examined to be called again at any time before the verdict is rendered, notwithstanding the witnesses were separated before their first examination, and had since had an opportunity of communicating with each other. *State* v *Silver*, 332

TRUST.

1. A *cestui que trust*, who obtained possession in that character, is not permitted

at law to deny the title of the trustee, and where he had admitted it by a parol declaration, a purchaser under the trustee is not bound to prove the title of the latter. *Den ex dem. White* v *Albertson*, 241

2. By RUFFIN J. At law a trustee is for all purposes seized in fee, and may sue for an injury to his estate without reference to the interest of the *cestui que trust*. *Mordecai* v *Parker*, 425

Vide *Execution* 11.

USURY.

1. A bond which is valid between the obligor and obligee, is also valid in the hands of an assignee who has discounted it at a higher rate than the legal rate of interest, and the latter may recover the full amount of the bond of the obligor, notwithstanding he claims through an usurious endorsement. *Collier* v *Nevill*, 30

2. By RUFFIN J. A mistake in the construction of the statute of usury, if it results in taking more than the legal rate of interest, will render the contract usurious. But an error in *fact*, by which more than legal rate is reserved will not vitiate. *Ibid.*

3. By the same. If a security be usurious in its creation, it is void in the hands of an innocent holder. But if valid in its inception, a subsequent usurious agreement does not avoid it. *Ibid.*

4. By the same. The object of the statute against usury is to protect the borrower, not to enable a real debtor to avoid the payment of a just debt, and hence the latter cannot aver an usurious assignment, so as to defeat the assignee. *Ibid.*

5 By the same. A distinction exists between the usurious discount of accommodation notes, and notes which are perfect, and on which an action can be maintained. In the first case the discount is a loan to the maker, and the note is void under the statute. In the second it is the purchase of an existing valid security, and the endorsee may recover on it. *Ibid.*

6. A sheriff who had collected money upon an execution and had neglected to pay it to the plaintiff, and was thereby subject to damages at the rate of twelve per cent per annum, having lent the money thus collected to a third person at the same rate of interest, was held guilty of usury, and liable to the penalty imposed by the act of 1741 (*Rev. c.* 28)—*Dowell* v *Vanney*, 43

7. By RUFFIN J. It seems that an agent who lends money at an usurious rate of interest, is liable to the penalty, notwithstanding he discloses his character. *Ibid.*

8. By the same. A pure contract of indemnity against a doubtful claim, is not within the statute against usury, but an agreement whereby the borrower agrees to pay the lender the same rate of interest which the latter is bound to pay a third person, and which exceeds the legal rate is not a contract of indemnity within the meaning of the rule, and this whether the obligation of the lender be created by act of law or by stipulation. *Ibid.*

9. By the same. The payment of usurious interest to the Sheriff, or to an assignee, and much more to an agent, completes the offence. *Ibid.*

VARIANCE.

By HENDERSON C. J. An endorsement by the foreman of the grand jury of the initial letter of his first name where the record of his appointment states his name at length, is not a material variance.—*State* v *Collins*, 117

Vide *Debt, Action of*, 3, 4—*Malicious Prosecution* 3.

VERDICT.

1. By RUFFIN J. A verdict that "the statute of limitations does not bar," is not responsive to the issue, and is erroneous. But it is such a minute of the verdict as to enable the Superior Court to correct the entry; and although the Supreme Court cannot make this correction, but if it proceeds to judgment must award a *venire facias de novo*, yet it will stay the judgment, till the correction is made in the Court below. *Dowell* v *Vanney*, 43

2. By RUFFIN J. Where a party, against whom a judge expresses an opinion, refuses to submit to it, but puts his cause to the jury, and is unsuccessful, although the judge may have erred, yet the verdict is not to be disturbed, if upon the whole case it is correct. *Grice* v *Ricks*, 62

3. By HALL J. Where the plaintiff declares in two counts, and the attention of the jury is directed by the judge to one of them only, a general verdict found by them is presumed on that count. *Jones* v *Cook*, 112

4. Where *non assumpsit* and the statute of limitations are pleaded, and the jury find the general issue for the defendant, this Court will not examine the charge of the judge on the plea of the statute. *Bullock* v *Bullock*, 260

Vide *Amendment* 3—*Damages* 2—*New Trial* 1.

WARRANT.

1. A search warrant can be granted only to seize stolen goods, and when one recited, that A had enticed the negroes of B to leave him, and that he was harboring them, and commanded the officer to seize them; it was held that the justice had no authority to issue it, and that it did not justify the officer. *State* v *McDonald*, 468

2. By DANIEL, J. An officer cannot decide whether a warrant is issued properly, but he must at his peril determine whether he who issued it had jurisdiction of the matter. *Ibid.*

WILL.

1. Where one gave direction for drafting a will both of real and personal estate, and upon receiving the draft, was informed that in its present shape it was good only as to personalty, and did no act declaring it to be his will, but merely kept it with his valuable papers; it was held not to be a valid will of personalty.—*Fort* v *Fort*, 19

2. By RUFFIN, J. Does the want of attestation, where there is a clause of attestation defeat a will altogether? *Ibid.*

3. A will cannot be offered in evidence for any purpose without a certificate of the probate. *Sasser* v *Herring*, 340

4. In an issue of *devisavit vel non*, it was held by HENDERSON, C. J. and RUFFIN, J. that declarations of the supposed testator, made after the execution of the will, were admissible to prove that it was obtained by fraud, notwithstanding the act of 1819, (*Rev. c.* 1004,) to prevent frauds in the revocations of wills. DANIEL, J. *dissentiente*, but holding declarations made at the execution of the will, to be admissible as part of the *res gestæ*.—*Howell* v *Barden, et al*, 442

WITNESS.

1. A party is not bound to offer an incompetent witness in order that his adversary may waive the objection and cross-examine him *Crowell* v *Kirk*, 355

2. By DANIEL, J. An attesting witness may be asked his opinion of the testator's sanity, but the same question to another witness is improper. *Ibid.*

3. By RUFFIN, J An attesting witness is the witness of the law and may be discredited by any one who examines him. *Ibid.*

4. A witness who is offered to prove what was deposed to on a former trial between the same parties, by a person who is dead, must give the substance of the testimony, not its effect. *Ballenger* v *Barnes*, 460

6. By RUFNIN, J In an action against a constable for wrongfully seizing goods of A, under an execution against B, the latter is not a competent witness to prove title to them in himself. *Waller* v *Mills*, 515

Vide *Trial.*

WRIT.

1. A writ signed by an Attorney, under a verbal authority of the clerk, is a nullity; and its subsequent recognition by the clerk or sheriff will not render it valid. *Gardner* v *Lane*, 53

2. Sealing is necessary to the validity of all writs, except those issuing to the county of the court where they are returnable, and a sheriff by acting under an unsealed writ, does not thereby render it valid. *Den ex dem. Seawell* v *Bank of Cape Fear*, 279

3. By HENDERSON C. J. Where the Sheriff has acted under an unsealed writ, the Court from which it issued, may after its return render it valid by affixing the seal. *Ibid.*

Vide *Abatement* 2.